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POLITICAL SCIENCE QUARTERLY.

HARRINGTON

AND HIS INFLUENCE UPON AMERICAN POLITICAL INSTITUTIONS AND POLITICAL THOUGHT.

JAMES HARRINGTON has not the reputation as a political thinker that he deserves. This is partly due to some fanciful notions on his part respecting forms of government, partly to peculiarities of style, but principally to the fact that the republican theories for which he contended were discarded in his own country. He had no followers. He founded no school. Still, though overlooked and unrecognized in England, he led and inspired the views of early American statesmen. It is not too much to say that he has left a marked impression upon our political institutions. It is well to recall to view his merits in this centennial year of the birth of the United States Constitution.[1]

Before sketching the writings of Harrington, some general remarks may fitly be made concerning his age and his place in

[1] Reference is made in this paper not only to his principal work, *The Oceana*, but also to tracts written in support of it and setting forth his views upon other political questions. These are:

The Prerogative of Popular Government.

The Art of Law-giving.

Valerius and Publicola.

Political Aphorisms.

The Ways and Means of introducing a Commonwealth by the Consent of the People.

The Humble Petition of divers well-affected Persons, with the Parliament's Answer thereto.

The edition of his works referred to in this paper is by John Toland, printed at Dublin in 1737.

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it. He lived at a time when a most heroic effort was making to put political institutions on their trial, to probe them to their foundations, and, where found defective, to put new ones in their place. English Puritanism is well described as having been not merely an effort to restore purity to religion, but also a protest against all authority as such, — a destructive and remorseless criticism, sparing no institution in the state which on trial could not give a good account of itself. It was something more, even, than this. It proposed, after destroying what was antiquated and useless, to set up not merely a new spiritual, but also a political kingdom, in which both the state and the church were to be re-established and brought into official relations, which it was fondly hoped would be harmonious as well as permanent. To accomplish this great result, everything must undergo revision. Nothing could be regarded as settled. The air was thick with the shower of controversial pamphlets falling on every side. Their titles were as quaint as their style was strange and uncouth. There was no question of literary culture or scholarly finish of expression. If a man had a burning word to say, he took his own mode of saying it. His merit, if any, was that he was dead in earnest; and he very probably succeeded, even through the dimness of his utterances, in transferring to his readers a portion of the glow which he felt in his own heart. Most of these controversial works, once so thoroughly alive, are now dead and forgotten. There remain of them only single copies in the British Museum, that great mausoleum of literature. Their preservation is due probably to dry antiquarians, who rescued them from absolute forgetfulness not because they were intrinsically valuable, but simply because they were once new and now old. Out of all this mass, there remain some most noticeable writings. We are speaking of the time when the best thoughts of Thomas Hobbes, James Harrington, Oliver Cromwell, and John Milton were given to the world and were agitating the minds of their contemporaries.

Apart from the general interest, that we might have in the works of these and kindred spirits, they are particularly valuable in connection with the rise and growth of political ideas in this

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country. These writers belonged to a party that had a powerful voice in framing the political institutions of the American people. They lived and flourished but a little more than a hundred years before the war of independence and the formation of the American constitution. The din of the great English rebellion and the rejoicings at its close had scarcely ceased to ring in men's ears, when our greater and more successful rebellion was inaugurated by men who had studied the writings of these great English radicals and had fully imbibed their spirit. Our statesmen knew the thoughts of Harrington and Hobbes and Milton, as we to-day know those of Washington, Adams, Hamilton, and Jefferson. John Adams was perfectly familiar with Harrington's *Oceana* and much influenced by its teachings, as his writings show us.

It has been supposed by many that the framers of our early political papers struck out some quite original thoughts — startling by their novelty as well as profound in their wisdom. The contrary is believed to have been the case. Instead of being originators, they were for the most part judicious copyists. Our own immortal constitution, when considered as to its specific provisions, is largely indebted to a judicious use of the scissors. Are its framers defining treason? They copy verbatim the words of an old English statute. Are they anxious to secure individual liberty? They copy from the English bill of rights. Are they concerned with the regulation of impeachments? They compliment the New York constitution of 1777 by incorporating its provisions with some special phrases of their own. In fact, they borrowed right and left, and so made up the splendid mosaic, called the United States constitution, emblazoned with all the insignia of liberty, and ornamented with the time-honored inscriptions of victory won from absolute power on many a hotly contested field, while all its parts are fitted together with an exquisite precision and with regard to its general effect. In one point it is defective, where it could gain little advantage from the lessons of an earlier political philosophy. That philosophy, as will be seen hereafter, affirmed that all political power resided with the people, but suggested no

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adequate means of ascertaining its will in the supreme act of choosing an executive. A monarchy knows no means of settling a disputed succession but war. The great problem hitherto insoluble is, when the sovereign power rests with the people, and political parties are nearly balanced, to find out what machinery can be trusted to register correctly the votes for the executive head of the nation. The man who can invent and successfully introduce machinery of this kind, will certainly win the applause of his own generation, and may with reasonable expectation look forward to a political immortality.

The great political thinkers of the English commonwealth have had little or no recognition in England itself. When Charles II came to the throne, there was such a revulsion of feeling that liberal political thought was absolutely arrested. Cromwell's memory was execrated; Harrington's views were derided as those of an impracticable visionary; Milton hid himself in obscurity from a Parliament that would have imprisoned him if he had been visible. All the legislation of Cromwell and his associates ceased to have force. His name was omitted from the list of English rulers. To an English lawyer, Cromwell has no legal existence, Charles II having succeeded his father as king at the very moment of his execution. Cromwell was henceforward but a political nightmare. His was a name to conjure with and "fright the isle from its propriety." All over England he was "Noll" and "old Noll" in every variety of flunkey witticism which the scatter-brained courtiers of the time could invent. The head of the dead hero was placed on a pole over the very sanctuary of the law, Westminster Hall, in open derision of him who, more than any other Englishman of his time, had upheld the majesty of the law.

Americans, however, must learn to do justice to the great men to whom they owe so much. There is, doubtless, much rubbish in their writings. All this can readily be rejected, while the solid parts of their works richly merit attention. He who carefully studies them will be amply rewarded for his labor.

Without further preface I shall bring forward some notes upon the life and political philosophy of Harrington. For

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information concerning his life I am largely indebted to his enthusiastic biographer, John Toland.

James Harrington, who was born in January, 1611, was descended from an ancient and noble family. His great-grandfather, Sir James Harrington, was the ancestor of many noblemen, including dukes, marquises, earls, and barons. James was in early life a member of Oxford University, and a pupil of the great Dr. Chillingworth, whose works are in logic invincible and in style unreadable. Harrington was inclined to travel, and learned some of the principles of liberty in Holland, and gained culture by journeys in France and Italy. He very early exhibited a spirit of independence. He was present on one occasion when the pope of Rome was consecrating wax lights. Though he desired one greatly, on finding that he must kiss the pope's toe as a preliminary to receiving it, he declined it, saying that as he had kissed the king of England's hand, he thought it beneath him to kiss any other prince's foot. On his return from his travels, we find him quietly settled in England, the comfort of his friends and the charm of the domestic circle. We get some very pleasing glimpses of his character. He was eager to improve the education of his sisters, discoursing to them at large on the best mode of promoting their intellectual development as well as their religious sentiments and grace in manners. He was of a very liberal and compassionate nature, and could not endure to see a friend want anything that he might spare; and when the relief that was necessary exceeded the bounds of his estate, he persuaded his sisters not only to contribute themselves, but likewise to go about to the rest of their relatives to complete what was wanting. And if at any time they alleged that this bounty had been thrown away on ungrateful persons, he would answer with a smile that he saw they were mercenary, since they expected so great a return as gratitude.

It was such a man as this, having such engaging and lovable qualities, perhaps tinged with a slight melancholy, fond of study and not seeking after public employment, who was overtaken in his library and in the presence of his loving sisters and com-

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panions with the horrors of civil war. We first hear of him as involved in the troubles of 1646, when the Parliament commissioners, having the king in their custody, desired Harrington to wait upon his Majesty as a person known to him and connected with no party or faction. He made himself highly agreeable by his elegant and instructive conversation, except that when they happened to talk of a commonwealth, the king "seemed not to endure it" — as one well might suppose. Harrington never concealed his republican principles; but, republican as he was, he accompanied the king on the scaffold. He was evidently one of those good and noble men, found in every revolution, who at one and the same time are on the left of the party of the Right, and on the right of the party of the Left, without compromise of dignity or sacrifice of principle.

After the king's death, Harrington went to his library and in solitude worked upon his *Oceana*. It was his great and cardinal thought, that political institutions are not accidental or arbitrary, but rather of historic growth; and that there are natural causes in society which produce necessary effects in moulding and shaping institutions. He reasoned, accordingly, that the troubles of the time were not to be wholly attributed to wilfulness or faction, nor altogether to the mismanagement of the king, but rather to a silent change which had been going on in England for centuries in what he termed the balance of property, "which was daily falling into the scale of the commons from that of the king, until the scale of the latter had well-nigh kicked the beam." The king endeavored to govern, according to the methods of his predecessors, by levying arbitrary taxes and compulsory assessments, while the people were sure to struggle for preserving the property whereof they were in possession, never failing in every contest to obtain more privileges and to enlarge the basis of their liberty. This great proposition, that empire follows the balance of property, Harrington is said to have been the first to make out. His biographer, Toland, in enthusiastic strain, pronounces it a noble discovery, equal to that of the circulation of the blood, or of printing, or of the mariner's compass. His great purpose, and

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the object of his book, was to find out a mode of restoring the equilibrium, and to establish such orders and regulations in the state as "to make wicked men virtuous and fools to act wisely" — kind and benevolent enthusiast! While the printers were at work at his book, Cromwell's superserviceable adherents, thinking there might be something in it opposed to the Lord Protector's interest, had it seized, and conveyed it to the residence at Whitehall. Harrington invoked the good offices of Lady Claypole, Cromwell's favorite daughter, and by her interposition the book was speedily restored to him. In fact, Cromwell's friends had no reason for their suspicion. The work was dedicated to him with large-voiced praise. When he read it, he said, perhaps with a civil smile of contempt, that the gentleman would like to trepan him out of his power, but that what he got by the sword he would not quit for a little paper shot; and that while he disliked one-man power himself, he was only acting as a high constable to preserve the peace of the nation among the several parties.

After the restoration of Charles II, Harrington lived in a retired manner, as a person bound to no party or faction. He occupied himself in setting forth his political principles in other forms of expression, and particularly in reducing them to aphorisms. It was, however, a sin at this time to have been a republican. He was committed to the Tower of London, December 28, 1661, as having been engaged in treasonable practices. He begged delay for a few moments, that he might stick together the sheets of his *Aphorisms;* and then, without time to take leave of his inconsolable sisters, he was hurried to his place of confinement. Here he was long imprisoned without apparent cause, subjected to inquisitorial examinations without his tormentors finding anything against him except the theories in his writings. His health suffered under his confinement. He was finally released by a warrant from the king, but not until his faculties had become disordered. About the same time his fellow-republican Milton was suffering extreme sorrow on account of his blindness, and sung the solemn words, fitted also to the case of Harrington:

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My hopes all flat, Nature within me seems
In all her functions weary of herself;
My race of glory run, and race of shame,
And I shall shortly be with them that rest.

Harrington died September 11, 1677, having lived a little more than sixty-six years.

It is now time to consider the theories for which the *Oceana* still challenges our respect and admiration. The work is divided into a number of principal parts. The first is preliminary, treating of the general principles of government. Another shows more specifically the true art of making a commonwealth. Descending now to particulars, the author displays what he deems to be the true model for the commonwealth of England, under the name of "Oceana," and finally groups together the supposed benefits to be derived from his scheme.

Beginning with the true nature of government, he declares it to be an "empire of laws and not of men." This had been asserted, it is true, by philosophers of antiquity, but it had been forgotten or disowned. He reasserted it continually, brought it into notice, and made it the corner-stone of his system. To this may probably be traced the famous declaration in the constitution of Massachusetts, part 1, article 30:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; and the executive shall never exercise the legislative and judicial powers, or either of them; . . . to the end *it may be a government of laws and not of men.*

Still, he continues, the fundamental laws may vary and be wise or unwise. Wherever they vest power, there is empire. Empire is either foreign or domestic. The latter, domestic empire, is founded on property, real or personal, land or money. Where the land is in the hands of one, there is a monarchy; where it is owned by the few, there is an aristocracy; where it is controlled by many, you have a commonwealth. Accordingly the throne of England began to shake when a great law[1] was passed in the time of King Edward I, permitting the nobility

[1] *Quia Emptores*, 18 Edw. I, c. 1.

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to sell their estates. The same force is not attributed to money, because of its fugitive nature. This balance in land is termed by him an "agrarian" balance, and without it in some form a government, he argues, has no long lease of life. In a democracy it would seem that the ownership of land should be much subdivided, and a class of small freeholders introduced.

Here he touches upon the allowance of interest upon money in its relation to public policy. He says that interest (or usury) may sometimes be impolitic, as where the land allotments of the citizens are small, and the loan may overbalance the estate in the land. This was the real ground of the Mosaic prohibition. But in a country where merchandise is exercised it is so far from being destructive that it is necessary, else that which might be of profit to the commonwealth would rest unprofitably in private purses, there being no man that will venture his money but through hope of some gain, which, if it be so regulated that the borrower may gain more by it than the lender, usury (interest) becomes a mighty profit to the public and a charity to private men; in which sense we may not be persuaded by them that do not observe these different causes that it is against scripture.[1] These "men that do not observe" were probably such men as Bishop Jewel, who denounced in the most violent manner all interest as unscriptural and diabolical. His tirades are approved even to-day by a person so noted as John Ruskin.

Following this general line of thought, Harrington declares that it is not quite safe for a country to plant colonies abroad and to give the colonists full ownership of land; for, as he says, it gives a root to liberty abroad that may spring up foreign and savage, and be hostile to the mother-state. Speaking of some existing colonies, he says with remarkable foresight:

> They are yet babes that cannot live without sucking the breasts of their mother-cities; but such as I mistake if, when they come of age, they do not wean themselves; which causes me to wonder at princes, that like to be exhausted in that way.

[1] Treatise on the Prerogative of Popular Government, p. 246.

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It is not, however, in his view a complete statement to affirm that empire rests upon dominion over property. One must also have regard to the principles of authority, which are internal and founded upon "the goods of the mind." If any legislator can unite these in his government with those of fortune, he comes nearest to the work of God, whose government consists of heaven, the domain of the spirit; and earth, the domain of the body. It is sad to observe that the principles of power and authority — "the goods of the mind and of fortune" — do not meet or twine in the wreath or crown of empire. He now rises to a high plane and bursts out into an eloquent passage:

> Wherefore if we have anything of piety or prudence, let us raise ourselves out of the mire of private interest to the contemplation of virtue, and put a hand to the removal of this evil from under the sun — this evil, against which no government that is not secured can be good — this evil, from which the government that is secure must be perfect. We have wandered the earth to find out the balance of power; but to find out that of authority, we must ascend nearer heaven or to the image of God, which is the soul of man.

He next affirms, that true political liberty consists in the empire of law and not in the mere fact of the existence of freedom. There must be security for its continuance. Here he crosses the path of the philosopher Hobbes, who had maintained that liberty is the same, whether the commonwealth be monarchical or popular. Hobbes had illustrated his ideas by saying that on the turrets of the city of Lucca in Italy there is inscribed in great characters the word *libertas*, yet no man can thence infer that a particular man has more liberty or immunity from the service of the commonwealth there than in Constantinople. Harrington aptly rejoined that this was but the case of the mountain in labor bringing forth an equivocation. He maintained a fine and accurate distinction to this effect: that no one obtains his liberty *from* the law, but rather *by* the law. The source of his liberty is from the God of nature; it is only made practically secure by the rule that no man can be controlled but by law, and that law, too, framed by every

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private man, which by that means comes to be the liberty of the commonwealth.

At this stage of his discussion, he perceives that an objection will be raised to his theories highly difficult to answer. In fact, the core of the question is not yet reached. The objector will say: How will you bring it about that men, even in a popular government, will be willing to abandon their own individual interest and follow that course which is for the general advantage? Of course it would be a fine thing to persuade every man in a popular government not to carve for himself that which he desires most, but to be mannerly at the public table and to give the best from himself to decency and the common interest. In connection with this question, he hints at a great law of *self-sacrifice*. We may join with him in thinking that this is more truly the lamp of that framework we call popular government, than of the buildings which men frame with their hands for habitation or worship. His principal reliance is upon the establishment of such laws or orders as may give the upper hand in all cases to *common* rights or interests, notwithstanding "the nearness of that which sticks to every man in private." But how can the people to be governed be trusted to establish these great primordial laws? At this point he is driven to take refuge in the power of a single legislator to establish a constitution for his people after the ancient pattern set by Solon and Lycurgus. Referring to the then existing condition of England, he would expect that Cromwell would abdicate his one-man power and formally establish a commonwealth. This must be representative in any large state. The wise and the able men will naturally and necessarily come to the front, and the others, by an equal law of necessity, will yield to them. He goes so far as to say that if, in a hap-hazard way, you should bring twenty men together to form a commonwealth, about one-third would either be wise or at least less foolish than the rest, and that these upon acquaintance would be discovered and would lead the herd. There is thus a natural aristocracy of intellectual and moral worth, diffused by God through the whole body of mankind to this end and purpose, and therefore such as

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the people have not only a natural but a positive obligation to make use of as their guides. These men form a natural senate, on which the legislator in establishing his government could lay hands. Their function would be to discuss, debate, give advice, and enlighten the people. The rest of the community would be represented by a popular body or assembly, whose office it would be to adopt or reject the advice given. Debating by the natural aristocracy, and selection by the people of the truth disclosed by their debates, is thus the great law of popular government. He says: "There is a party — a refined party — a nation in a nation, that must and will govern."[1] As a matter of detail, the senators were to be worth £100 per year, and to be elected by the people in their precincts.[2] Here we have the germ of a property qualification for legislators.

Harrington here struck out a great and novel truth, though we should now give it a wider application than he made of it. We would deem it impracticable to have two representative assemblies organized in such diverse ways. We would, however, agree that a large part of the duty of representative assemblies is not merely to pass laws but to discuss great and fundamental principles, while the discussions are to be submitted to the people for the purpose of moulding and guiding their general opinion. The value of this function of a popular assembly can scarcely be overestimated. Harrington failed to regard it from this modern point of view, as the immense capacities of the press in disseminating such information were then wholly unrecognized and unknown and in fact discountenanced and proscribed.

Three great practical measures are now recommended with a view to the preservation of an equilibrium in a popular government.

1. There must be a law limiting the amount of land which any man can own. In his own words, there must be a perpetual law, establishing and preserving the balance of dominion by such a distribution, "that no one man or number of men within the compass of the few or the aristocracy can come to overpower the whole people by their possessions in land." This is but a

[1] Valerius and Publicola, p. 485. [2] *Ibid.*, p. 483.

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deduction from a principle before referred to. As dominion or empire depends on the ownership of land, care must be taken that ownership shall be widely distributed. If land is to be leased, he is much opposed to rack-rents.[1] "Racking of rents is a vile thing in the richer sort, an uncharitable one to the poorer, a perfect mark of slavery, and nips your commonwealth in the fairest blossom."

2. Care must be taken to prevent the magistracy from acquiring dangerous power. His expedient in this direction is such equal rotation or succession to magistracy, conferred for such convenient terms, as to take in the whole body by parts succeeding others through the free election or suffrage of the people. Here is the first sound of the doctrine destined hereafter to echo around the democratic world — "rotation in office" — not, however, in Harrington's view, for the sake of the officeholder, but for the sake of the people.

3. The suffrages of the people for their representatives must be given by secret ballot. "The election or suffrage of the people is most free where it is made or given in such a manner that it can neither oblige nor disoblige another, nor through fear of an enemy or bashfulness towards a friend impair a man's liberty."

Here are certainly three great principles, new, as applied to government in England: limitation in the ownership of land, rotation in office, and the secret ballot. While we in America have seen thus far no occasion, owing to our unlimited territory, to adopt the first, all the world knows what use we have made of the two last. We must pause to consider Harrington's views upon some of these theories more at large.

In insisting upon rotation in office, his leading thought was to fix specified terms of office for the principal officeholders, so that their official conduct might at stated intervals be brought before the people of the commonwealth for approval. If their conduct in office were disapproved, it should be the right of the people to relegate them to private life. To Harrington's suggestions may fairly be traced a clause in the constitution of Massachusetts:

[1] Oceana, p. 178.

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In order to prevent those who are vested with authority from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life, and to fill up vacant places by certain and regular elections and appointments.[1]

But this was not all. He would organize the office, in most cases, so that it should never be vacant. In his scheme the office-holding body was to have a continuous existence. His thought was that on which the United States Senate is organized. One-third of the members holding every important office were to go out of office every year. The members of parliament and of the state council and even the city boards of aldermen were to be classified in this manner. By such an arrangement he thought he could reconcile the movement of the age with permanency of service. He resorts to an illustration:

The House, having at once blossoms, fruit half ripe, and others dropping off at full maturity, resembles an Orange tree, such as it is at the same time Spring and a Harvest too. The vicissitude of your Senators is not perceivable in the steadiness and perpetuity of your Senate.[2]

It was not with any desire to gratify the clamor of men out of office and desiring to get in that he accepted the doctrine of "rotation in office." It was, however, a part of his scheme that the officeholder should not be at once eligible to fill the vacancy occasioned by the expiration of his term of service, but should be ineligible for a specified period. His scheme somewhat resembles the rule applied to the election of sheriffs in New York. The immediate rotation would not be a fatal defect, though it would make the government very imperfect.[3] Though the phrase "rotation in office" is perfectly familiar to us, it was new in English politics, for in England office is in general deemed to be a matter of property. Harrington was eager to bring into prominence the fact that an office is in its nature a trust for the people, and urged that it should be surrounded with such safeguards as to keep constantly before the office-holder and the citizen its essential character.

[1] Mass. Const., part i, art. viii. [2] Oceana, p. 140.
[3] The Prerogative of Popular Government, p. 314.

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His theory is plainly shown by the objections made to it by John Milton, who had a plan of his own competing with it. Milton's scheme was to have senators chosen for life. In arguing in its favor, he remarks:

> If it be feared that long continuance of power may corrupt sincerest men, the known expedient is, and by some [meaning Harrington and his supporters] lately propounded, that annually (or if the space be longer, so much perhaps the better) the third part of the senators may go out according to the precedence of their election, and the like number be chosen in their places, to prevent their settling of too absolute a power, if it should be perpetual [for life]; and this they call "partial rotation." But I could wish that this wheel or partial wheel in state, if it be possible, might be avoided, as having too much affinity with the wheel of fortune.[1]

Milton then proceeds to argue that Harrington's plan will result in putting out a great number of the best and ablest members, and bringing in raw and inexperienced men, to the injury of public transactions, and thus nothing firm or steadfast can be expected from such a floating foundation.

The controversy between Milton and Harrington was greatly relished by the royalist wits of the time. A burlesque pamphlet was published by them purporting to be an answer by Harrington and his friends. Harrington is made to say to Milton:

> As to *rotation*, I shall only add this: that a commonwealth is like a great top, that must be kept up by being whipped round and held in perpetual circulation; for, if you discontinue the rotation, and suffer the senate to settle and stand still, down it falls immediately. And if you had studied this point as carefully as I have done, you could not but know there is no such way under Heaven of disposing the vicissitudes of command and obedience, and of distributing equal right and liberty among all men, as this of *wheeling*.[2]

But in spite of Milton's arguments and royalist jeers, Harrington's theories had come to stay, and we have learned by the experience of a hundred years that his plan of rotation is con-

[1] The Ready and Easy Way to establish a Free Commonwealth.

[2] Harleian Miscellany, IV, 179–186. This pamphlet purported to be printed by Paul Giddy, at the Windmill in Turn-again-Lane, 1660, and certified by Trundle Wheeler, clerk to the Rota.

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sistent with permanence and the moulding influence of progressive public opinion. He would be a bold man who would now propose to abandon it.

More than all else, Harrington laid stress upon the secret ballot. In his travels in Italy, he had studied with care and greatly admired the political constitution of Venice and the ballot as he found it there. He wished to introduce it into England with some modifications, all leading to extreme intricacy of detail. In his collected works there is a very curious plate, showing the balloting by his senate for the leading offices of state. The great features are a combination of the "lot and the suffrage" — the lot narrowing the list of the competitors, and the suffrage selecting from the list thus narrowed. The lot provides a number of electors or nominators from the body of the senate. From the nominations, the senators make the selection. The lot for nomination is only an ingenious device for avoiding multiplicity of candidates and the scattering of votes. There is an elaborate apparatus of gold balls, and silver balls, and urns. When the votes are to be taken, the senators are represented in the plate as seated in rows upon benches with the great officers of state in front of them, while pages go up and down among the members with their ballot boxes, shouting out the name of the office and the candidates, whereupon

> Every magistrate and senator holds up a little pellet of linen, as the box passes, between his finger and his thumb, that men may see he has but one, and then puts it into the same. The ballot box — consisting in the inner part of two boxes, being painted on the outside white and green, to distinguish the affirmative from the negative side — is so made that when your hand is in it, no man can see to which of the sides you put the suffrage nor hear to which it falls, because the pellet, being linen, makes no noise.

This little pellet of white linen, noiselessly doing its mighty work, is evidently the precursor of the later image of the "snowflakes falling on the sod." If the person voted for gets above one-half of the votes, he is elected; if not, the other nominees are voted for in the same way. If no election takes place before sunset, the whole proceeding must be repeated the next day

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through the medium of the nomination of newly chosen electors, for "this ballot-box is no juggling box, but an art that must see the sun." This is certainly a very slow way of voting, but it has the essential elements of the existing ballot. He was afraid of an objection, that his boxes would be too expensive, and enters into an elaborate calculation that they would only cost £25,000 for all England.[1]

But Harrington was no mere political thinker, contented with the discussion of abstract principles of government. He desired to apply his theories to the England of his own day — which he somewhat fantastically terms "Oceana," while Scotland figures as "Marpesia," and Ireland as "Panopœa." His characters appear under equally whimsical names, James I. being called "Morpheus," William the Conqueror "Turbo," and Cromwell "Olphaus Megaletor." He proceeds to sketch a particular constitution for England, defining and limiting political power. Here appears the first sketch in English political science of a *written constitution* limiting sovereign powers, an idea destined to become fruitful both in the United States and France. He has our modern notion of ratification by the people, instead of adoption merely by Parliament. He says, "The fundamental orders of the government may be consented to or subscribed by the people themselves, if their express pact shall be esteemed any additional security."[2] This was a great step forward, for even Magna Charta itself is to be regarded rather as ordinary legislation, subject to repeal and modification by Parliament, than as fundamental law, binding on Parliament itself. He justifies the provisions of his "constitution" by long speeches put into the mouths of his principal characters, and in particular introduces Cromwell under an assumed title of *archon*, and allows him an easy triumph by causing his supposed suggestions to prevail.

It is not the purpose of this review of Harrington's work to pay close attention to his specific plans for the government of the English of his day. In a history of political opinion, it

[1] Oceana, p. 41.

[2] The Humble Petition of divers well-affected Persons, p. 545.

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would be necessary to sketch them. This part of the work is the least successful, and has tended to becloud the residue. Its peculiar form as a state romance is probably due to the fact that Harrington wrote under some restraint. He could not tell in advance how Cromwell would receive his theories, and therefore disguised his views under the form of a political novel. A student will not, however, be prevented by the special and eccentric form of the work from detecting the treasure which is scattered through it. Von Mohl in his *History and Literature of Politics* has done Harrington but scanty justice. He dwells mainly upon the unpractical nature of his scheme of government for England, without paying attention to the numerous valuable suggestions to be found not only in the *Oceana*, but in other works. The present purpose is to develop Harrington's political principles, and pay little attention to the forms in which they are clothed. As soon as his *Oceana* was published (1656), he commenced an agitation for the actual adoption of its provisions by the proper authority. By 1658 he had interpreted and defended it from objections in other works. In July, 1659, a petition drawn up by him was presented by his supporters to the House of Commons, urging the adoption of a definite political constitution for England.[1] In this petition are some remarkable propositions. He asserts in so many words, "that the exercise of all *just* authority over a free people ought (under God) to arise from their own consent." Did not Jefferson, in drafting the declaration of American independence, have this sentence in mind? He made use of its very words in maintaining that governments derive their *just* powers from the consent of the governed. In this petition Harrington maintained "that those who govern must also be sometimes in the condition of the governed." This was a heavy thrust at the doctrine of kingship by divine right. "Otherwise," he says, "the governors will not be in a capacity to feel the weight of the government, nor the governed to enjoy the advantages of it." Going boldly onward, he sturdily maintained "that the supreme

[1] Masson, Life of Milton, V, 483. See petition itself in Harrington's Works (Dublin ed., 1737), p. 541.

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authority could not properly be settled in any single assembly whatsoever, having the power of propounding, debating, and resolving laws." This was a bold stroke indeed, for the very body that he was petitioning was asserting the very power that he condemned, and was as tender of its prerogative as any frowning king or jealous aristocrat. But he insisted, in its very face, that a parliament should only exercise legislative power, and that a magistracy ought to be provided having the whole executive authority of the laws. He clearly propounded the theory that governmental powers are either legislative, executive, or judicial, and that being distinct they ought to be vested in distinct bodies with separate functions. Here he supplied the very life blood of an American commonwealth; for if we omit these ideas from one of our constitutions, we might as well omit the constitution itself. The parliament or legislative power should have perpetual succession or descent, and without any possibility of a death or a failure in its being. Parliamentary power ought never to die or dissolve, though the persons be annually changing. This is the theory of the United States Senate. As Mr. Buchanan well expressed it, "The Senate is to-day, constitutionally and legally, the same body that met for the first time in the year 1789."

Harrington then proceeded to sketch, constructively, the elements of the right constitution for England. There should be two houses of parliament, one more numerous than the other, each organized on his plan of periodically shifting members, and elected by the people in convenient districts. There are also some important declarations concerning religious liberty — to be noticed hereafter.

It is to the credit of the Parliament that it accepted with cordiality these very advanced views. Its speaker gave the petitioners the thanks of the House, as they saw, that "the petition was without any private ends and only for the public interest." From this time forward, the Harrington party resorted to all available agencies for the dissemination of their views. They issued showers of pamphlets. They circulated throughout the city of London an engraving of an assembly in

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session and voting, dropping the little noiseless pellets of linen into the election urns. It was at this time that they founded their famous debating club called the "Rota," holding their meetings in a well-known coffee house. This was in 1659. Anthony Wood describes the meetings:

> Their discourses about government were the most ingenious and smart that ever were heard, for the arguments in the Parliament House were but flat to these. This gang had a *balloting* box and balloted, how things should be carried by way of experiment (tentamens), which being not used or known in England before, upon this account the room was very full.[1]

Harrington was one of the prime men. Cyriack Skinner, the friend of Milton, was among them. We may picture these and other leading men, seated along the walls of the room in the fashion of a grave senate; some of their number drawing out golden and silver balls from urns to get the nominating committee; the coffee-house waiters acting as senate pages and taking in the little linen pellets, — all practising for the great popular senate of the future, much as an impatient groom and bride go through the marriage ceremony at home to gain self-possession when they confront the real audience at church. While they are thus engaged, a band of drunken fellows rushes in from the tap-room. These "did much affront the junto" and tear in pieces their order and minutes. Then a party of soldiers, who were there as auditors and spectators, begin to show their teeth and would have kicked the intruders down stairs. Harrington now steps forward and with his moderation and persuasiveness hinders them.

The doctrines set forth at the Rota were very taking, exciting apprehension among political leaders. "The greatest of the Parliament men hated this design of rotation and balloting as being against their power." The club rivalled that which was the germ of the future Royal Society as the centre of intellectual amusement in London.

It was an era of political chaos. Harrington compared the

[1] A. Wood, Athenæ, III, 1125, 1126, — quoted in Masson's Life of Milton, V, 484.

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contending parties to a company of puppies in a bag, where, finding themselves uneasy for want of room, every one of them bites the tail or foot of the next, thinking that to be the cause of his misery. The members of the club, as one of the inducements to adopt the balloting plan, were constantly crying out that there was no possibility of the king's return. But they left out of account the grim and silent man on horseback from the north — General Monk. He soon showed himself a factor not to be ignored. With the return of the king, the reign of chaos ended, faction for the moment lost its voice, and one loud chorus of joy or seeming joy sounded over England, disturbed by no word nor even note of discord. Charles II came with his graceful and easy manners, with his courtiers and his harem, — and rotation in office, the golden balls, the black and green urns, the little noiselessly falling pellets of linen, and even the moderate and persuasive Harrington himself, with his grave, thoughtful and benevolent face and long flowing locks, straightway passed out of the sight and memory of that generation of men. But the idea of the secret ballot was destined to survive and to become fruitful. A little more than a hundred years later, the first constitution of New York alluded to the ballot at political elections in a tentative and experimental manner.

Whereas an opinion has long prevailed, among divers of the good people of this state, that voting at elections by ballot would tend more to preserve the liberty and equal freedom of the people than voting *viva voce*, to the end, therefore, that a fair experiment be made which of those two methods of voting is to be preferred,

Be it ordained, that as soon as may be after the termination of the present war between the United States and Great Britain, an act or acts be passed by the legislature of this state for causing all elections thereafter to be held in this state for senators and representatives in assembly to be by ballot, and directing the manner in which the same shall be conducted; and whereas it is possible, that after all the care of the legislature in framing the said act or acts, certain inconveniences and mischiefs unforeseen at this day, may be found to attend the said mode of electing by ballot, it is further ordained that if, after a full and fair experiment shall be made of voting by ballot as aforesaid, the same shall be found less conducive to the safety or interest of the state than

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the method of voting *viva voce*, it shall be lawful and constitutional for the legislature to abolish the same.[1]

Though this experiment seemed so doubtful one hundred years ago, it is a singular evidence of the foresight of Harrington as applied to the affairs of a commonwealth, that there is no proposal in any influential quarter to abandon the ballot with its attendant imperfections and evils and to restore *viva voce* voting.

In England, balloting did not triumph until 1872, when it was applied to parliamentary and municipal elections. The greatest precautions are there taken to preserve Harrington's cardinal point of secrecy. The voter is protected from all inquiry as to his ballot, even in judicial proceedings. The existing English statute provides that "No person who has voted at an election shall, in any legal proceedings to question the election or return, be required to state for whom he has voted." After two hundred years or more, Harrington and his Rota club have triumphed even in England, and the ballot box has become the symbol of popular election.

Harrington was at extraordinary pains, while he kept the voting secret, to provide devices to keep it pure. "The purity of the suffrage," he writes, "in a popular government is the health if not the life of it, seeing the soul is no otherwise breathed into sovereign power than by the suffrage of the people."[2] As we have seen, he would allow no balloting except by daylight. He made his senators and others take an oath to hold a pure election. But he evidently had his misgivings about the whole subject, as good men have them to-day, and felt that the custody of the box could be safely entrusted only to men who were above fraudulent practices and who were sensible to the obligation of an oath. With all our elaborate devices we can do but little better than he did. In the long run, the question of purity in elections is one of honor and political honesty. We can only follow Harrington's example, and, raising our hands to heaven, swear that by every effort in our power the ballot

[1] N.Y. Constitution of 1777, sec. 6. [2] Oceana, p. 120.

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box shall be preserved not only from defilement by ourselves, but also by our neighbors, and that we will visit on those who pollute it — those who seek the life of the people, by depriving them of their sovereign power — penalties fit to express our horror of this crime of parricide. An enemy takes a nation's life by force; a ballot-box stuffer takes it by fraud of the vilest kind, and the wretched traitor is not fit to live.

Our author gives one reason for his faith in the ballot which deserves special notice. He was firm in the belief that a commonwealth could only be carried on by gentlemen, by the "natural aristocracy," and that it would, as a matter of fact, be so carried on in England. "There is something," he says, "first, in the making of a commonwealth, then, in the governing of it, and last of all, in the leading of its armies which seems to be peculiar to the genius of a gentleman." And again: "It is in the universal series of history that if any man has founded a commonwealth, he was first a gentleman." He then calls over the roll of legislators, ancient and modern, down to his own time, including Oliver Cromwell, showing that they were all of gentle blood. He insists upon the same fact in the case of civil administrators and of generals. He expected this state of things to continue in England. He was not a socialist. He expected men of great landed wealth to continue in a commonwealth, though not men of unbounded fortune. In these and others he expected that the old sense of honor would survive, and that they would never violate an oath. Thus the ballot box would be safe in their hand. Our fathers at the time of the revolution had some of Harrington's belief. Says John Adams, after speaking of the relation of nobles to the safety of the state:

> By nobles I mean not peculiarly a hereditary nobility but the *natural and actual aristocracy* among mankind. The existence of this you will not deny. You and I have seen four noble families rise up in Boston — the Crafts, Gores, Dawes, Austins. They are as really noble, except in power, as the Howards, Somersets, and Berties of England. It is a distinction which nature has made and we cannot abolish.[1]

[1] Letter from John Adams, in his Works, VI, 407.

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"Natural and actual aristocracy" is an expression of Harrington's. His idea of nobility in a commonwealth appears in the following extract:

> Your mechanics, till they have first feathered their nests, like the fowls of the air, whose whole employment is to seek their food, are so busied in their private concernments that they have neither leisure to study the public interest nor are safely to be trusted with it, because a man is not faithfully embarked in this kind of a ship if he has no share in the freight. But if his share be such as gives him leisure by his private advantage to reflect upon that of the public, what other name is there for that sort of men but nobility?[1]

In this review of Harrington's writings we have gone far enough to see that he is not merely a writer of a political romance, enamored with a fanciful plan of government. If that were the true conception of him, he would be entitled to little attention. The main grounds on which he can challenge the interest of this generation are the wisdom of his suggestions on various subjects of general interest, and the breadth of his views, far beyond those prevailing among the statesmen of his time. To some of these reference will be made.

He maintains the propriety, even in a democracy, of establishing limitations upon the people's will. To him the people is sovereign, the people is king. He cries out: "This freeborn nation, distributing her annual magistracies and honors, is herself KING PEOPLE."[2] At the same time he is apprehensive of danger if the people be uncontrolled. His words will bear quotation:

> For as much as sovereign power is a necessary but a formidable creature, not unlike the powder, which is at once your safety and your danger, being subject to take fire *against* you as well as for you, it must be so collected as to be in full force and vigor and yet so distributed that it is impossible you should be blown up by your own magazine. Let them who will have it that power, if it be confined, cannot be sovereign, tell us whether our rivers do not enjoy a more secure and fruitful reign within their proper banks, than if it were lawful for them in ravaging our harvests to spill themselves. . . . Whether power not confined to the bounds of reason and virtue, has any other bounds than those of

[1] Oceana, p. 135. [2] *Ibid.*, p. 100.

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vice and passion? Or if vice and passion be boundless and reason and virtue have certain limits, on which of these thrones holy men should anoint their sovereign?

Then follows this fine utterance: "The sovereign power of a commonwealth is no more bounded, that is to say, straitened, than that of a monarch, but is *balanced*." In other words, the checks and restraints upon the sovereign power of the people are to be self-imposed — are to be found in the provisions of the constitution.[1] Accordingly, Harrington would restrict the participation of the people in the direct act of government. "For my part," he says, "where the people have the election of the senate, not bound to a distinct order" — here, of course, he glances at the House of Peers — "and the 'result,' which is the sovereign power, I hold them to have that share in the government (the senate being not for life), whereof with the safety of the commonwealth they are capable in nature, and such a government for that cause to be a democracy." And again: "A people reduced to misery and despair become their own politicians, as certain beasts when sick become their own physicians; but the people for the most part are beneath the beasts in the use of them." Observe that he has no idea of a pure democracy, but of a representative government, having powers conferred by the people under specific limitations.

Holding these views, he had the greatest faith in a faultless organization of the government. Practically he worshipped the constitution. In this respect he resembled some American statesmen, who seem to think that the country is safe if it can only be tied up with sufficient tightness in the bands of an unyielding constitution. "No man," he argues in his quaint way, "shall show me a commonwealth, born straight, that ever became crooked; nor shall any man show me a commonwealth, born crooked, that ever became straight."[2] And again: "A commonwealth, that is rightly instituted, can never swerve, nor one, that is not rightly instituted, be secure of swerving by reduction to her first principles."[3] This organization must involve as its basis equality before the law. "Equality, which

[1] Oceana, p. 101. [2] *Ibid.*, p. 151. [3] *Ibid.*, p. 193.

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is the necessary dissolution of a monarchy, is the generation, the very life and soul of a commonwealth."[1] He fondly hoped that his commonwealth should be immortal, seeing the people, being the materials, never die, and the form, which is motion, must, without opposition, be endless. So he compares a well-framed political scheme to the luminaries of heaven. "The bowl," he exclaims, "which is now thrown, if there is no rub, no impediment, shall never cease, for which cause the glorious luminaries, that are the bowls of God, were once thrown forever."[2]

Among other things, he laid great stress on military power and the correct conduct of war. The council of state was to have no power to engage the commonwealth in war without the consent of the senate and the people.[3] War was to be a legislative and not an executive act, as it is under the provision of the United States constitution. It was to be waged, when declared, with the heaviest possible forces. To make war with small forces is not husbandry, but a waste, a disease, a lingering and painful consumption of men and money. "The Romans, making theirs thick, made them short, and had little regard to money, as that which they who have men enow can command where it is fittest that it should be levied."[4] The whole responsibility of a battle should be cast on the general in command. He says with great force: "Let a council of huntsmen, assembled beforehand, tell you which way the stag shall run, where you shall cast about at the fault, and how you shall ride to be in at the chase all day; but these may as well do that, as a council of war direct a general. The hours, that have painted wings and of different colors, are his council. He must be like the eye, which makes not the scene, but has it so soon as it changes."[5] Here he but anticipates the judgment of our own greatest general. "The only eyes a general can trust are his own."[6] In case of extremity, the last man in the nation should be subject to levy, "to the end that the commonwealth,

[1] Oceana, p. 194.
[2] *Ibid.*, p. 100.
[3] *Ibid.*, p. 127.
[4] *Ibid.*, p. 188.
[5] *Ibid.*
[6] General Grant.

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in her utmost pressure, may show her trust that God in his justice will remember mercy by humbling herself and yet preserving her courage, discipline and constancy to the last drop of her blood and the utmost farthing."[1]

The commonwealth, for this and other reasons, must in his view, if driven to extremity, have a dictatorial power. He even went so far as to devise a regular means for its exercise. He admitted its danger, but held that without it the state could not be safe from falling into dissolution. His argument is substantially as follows. The orderly course of a commonwealth can only be determined by debate, which involves slowness and openness. Suddenness of assault requires instant action and secrecy. It would be well in your constitution to provide for secret and swift methods, lest, if you practise the violation of your fundamental law to meet special emergencies, your commonwealth may at last come to be dissolved. Here are words pregnant with wisdom, suggesting crises which we were obliged to face in the late civil war. It is fortunate that we have in our time a reserve power, such as he in substance indicated, in the possibility of amending our constitution. We may thereby avoid the tendency towards a dictatorship in critical times, which he so much dreaded and yet deemed so likely to occur.

Desiring as he did to keep a constant supply of the forces necessary to preserve society from decay, he was a firm believer in general education.

> A man is a spirit, raised by the magic of nature: if she does not stand safe and so that she may set him to some good and useful work, he spits fire and blows up castles; for where there is life there must be motion or work, and the work of idleness is mischief, but the work of industry is health. To set men to this, the commonwealth must begin betimes with them or it will be too late; and the means whereby she sets them to it is education, the plastic art of government.[2]

One of the leading laws for the government of his proposed commonwealth was, that a sufficient number of *free schools* were to be erected and endowed in every division of the new nation, with a strict inspection of the schoolmaster's manner of life

[1] Oceana, p. 176. [2] *Ibid.*, pp. 171, 172.

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and teaching, and of the proficiency of the children, after the manner of the great school at Westminster. A parent having more sons than one was to be punished if he did not send them to school, the education being "*gratis*" if he was not able to pay for it. This rule was to continue until the age of fifteen. After that the child should be made an apprentice to some trade, or be sent to a law-school or a university. The commonwealth still had an interest in him, for he must not stay beyond the age of eighteen unless he was fitting himself for some profession, the object being to prevent one's occupying himself with aimless study. If he travelled, he should on his return prepare a paper containing an account of the public interest, or form of government, of the states he had visited. If well done, this was to be printed and published at public expense with a "line in commendation" of the author.[1] This is a remarkable instance of an early plan, both for free and compulsory education. Harrington was a great friend of university education, and could not understand the motives of men who opposed it. He says: "We cut down trees to build houses, but I would have somebody show me by what reason or experience the cutting down of an university should tend to the setting up of a commonwealth."[2] The statesman that he fancied must have a wide education. He must not only have the knowledge of the schools, but he must be a historian and a traveller. His argument here is somewhat curious. "Except a man can see what must be or what may be, he is no politician. Now if he has no knowledge in history, he cannot tell what has been; and if he has not been a traveller, he cannot tell what is; but he that neither knows what has been nor what is, can never tell what must be or what may be."[3] The great fault of his time was that the people had little education. He was never weary of saying that a commonwealth is the estate of the people, and a man, though he be virtuous, if he does not understand his estate, may run out or be cheated out of it. "In

[1] Oceana, p. 173. [2] *Ibid.*, p. 179.

[3] So John Rushworth says: "I take it to be the great business of every man's life to learn what the world is, and what hath been done and what is doing in it, and upon the whole to judge what he ought to do."

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fact," he said, "the grandees of his age, that laughed out openly at a commonwealth as a most ridiculous thing, would be regarded as mere idiots if the people only had eyes."[1] Laying so great stress upon intelligence, he considered it to be a great part of the duty of the senators to instruct the people. Some man, selected for his wisdom, was from time to time to deliver an oration or a lecture on the nature of popular institutions, either in the Parliament House, while the members were in town, or in some grove or sweet place in the field, while the Parliament shall, in the heat of the year, reside in the country.[2] He would thus keep the system of government fresh in men's memories. It was of the highest importance that his senators should be possessed of the graces of rhetoric and elocution, particularly when treating with some other nation that was "good at it, lest the advantage might remain with the merit of the art rather than with the merit of the cause."[3] He would even have in the government a department of affability, where the members of an academy should assemble every day towards evening, in a fair room with certain withdrawing rooms, and where all sorts of company, that will repair thither for conversation or discourse on matters of government news or intelligence, shall be freely and affably received and heard in the way of civil conversation, which is to be managed without any other awe or ceremony than is thereto usually appertaining, to the end that every man may be free, *etc.* Would it not be a relief to have a "bureau of affability" at our railroad and other business offices, and perhaps even in some of our governmental departments? He rhapsodizes upon the element of beauty in the administration of public affairs:

> Upon beauty, in which every man has his fancy, we will not otherwise philosophize than to remember, that there is something more than decency in the robe of a judge that could not be well spared from the bench, and that the gravest magistrate to whom you can commit the sword of justice will find a quickness in the spurs of honor, which if they be not laid to virtue, will lay themselves to that which may rout a commonwealth.[4]

[1] Oceana, p. 160. [2] *Ibid.*, p. 157. [3] *Ibid.*, p. 160. [4] *Ibid.*, p. 122.

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In order to secure the best officers, he would pay competent salaries. "He that lays his hand to the public plough is not to lose by taking it off from his own." He denounces a commonwealth, that is close in this direction, as penny-wise.[1]

His utterances concerning religion breathe a lofty spirit of toleration. While he desires that the Christian religion be established by Parliament and public preachers maintained, yet he insists that all that profess this religion, though of different persuasions, should be equally protected in its peaceable profession and public exercise, and be equally capable of all elections, magistracies and preferments in the commonwealth. He exclaims that without liberty of conscience, civil liberty cannot be perfect; and that without civil liberty, liberty of conscience cannot be perfect.[2] Liberty of conscience, he argues, will not suffer any coercive power in the matter of religion to be exercised in the nation. The teachers of the national religion are only to be those who voluntarily undertake their calling, and their hearers no other than those who voluntarily listen to them; and no gathered congregation is to be molested or interrupted in their way of worship, but vigilantly and vigorously protected in the enjoyment, practice and profession of the same. Here is an established religion with a perfect liberty of dissent. It says: The state will provide for you (the people) the ablest religious teachers. Do as you will about attending their services. According to Harrington's plan, the universities were to send probationers to churches for a single year. After that period, the people were to decide by ballot whether the minister was likely to be useful — a two-third vote in his favor being necessary.[3] There were no advowsons in his church; no patrons who could force a rector upon an unwilling people. His were free congregations, free to elect or reject their pastor. To this liberty of worship were two important qualifications. It did not extend to Jews nor to Roman Catholics. Not to Jews, for they were not then by public men deemed to be within the scope of rules applicable to Christians; not to Romanists, because of a jealousy of interference by a *foreign*

[1] Oceana, p. 167. [2] Valerius and Publicola, p. 489. [3] Oceana, p. 88.

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prince with his plan of government for England. It was his belief, as a statesman, that the then existing notions of allegiance to the pope, considered as a temporal monarch, entertained by many Roman Catholics, were inconsistent with due loyalty to the nation of which they were members. This may be called "limited toleration," but it was far beyond that of most men of his age. It was adopted by John Milton in his later years (1673). Professor Masson expresses Milton's view in these words: "*Until* and *without* the acceptance of the scriptures, no liberty of conscience; *after* and *with* that acceptance, all liberty" — except to Roman Catholics.[1] It would be interesting to know whether this modification of Milton's earlier views was due to the influence of Harrington. They could easily have been brought together, Cyriack Skinner being an intimate friend of both.

This was a broader platform than had been then proposed by the most liberal sects of the non-conformists. It stands in the most marked contrast with the bitter and intolerant legislation of the early years of Charles II's reign, when deviation from the established religion, by Protestant non-conformists as well as others, was visited by deprivation of important civil rights as well as severe punishment. Harrington's theory was, that the only source of true religious light was in the scriptures open to all men — not in translations, but in the original languages.

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While Harrington was thus maintaining liberty of conscience, he was conscious of the religious bigotry and one-sidedness of his age, and implored the church to raise up her hands to heaven for further light.[2] He had little confidence in the *political* wisdom of the clergy as a body. He would not allow them to exercise any political power. We find in the *Oceana* this remarkable provision:

> To the end that there be no interest at all, whereby the divines or teachers of the new religion may be corrupted or corrupt religion, they shall be capable of no other kind of employment or preferment in this commonwealth.[3]

This seems to be the parent of a clause long in the constitution of the state of New York:

[1] Masson's Life of Milton, VI, 697. [2] Oceana, p. 89. [3] *Ibid.*, p. 127.

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And whereas the ministers of the gospel are by their profession dedicated to the service of God and the cure of souls and ought not to be diverted from the great duties of their function, therefore no minister of the gospel or priest of any denomination whatever shall at any time hereafter, under any pretence or description whatever, be eligible to or capable of holding any civil or military office or place within the state.[1]

This was continued in the constitution of 1821, but disappeared in 1846. Harrington could not, though a "commonwealth man," have his belief hampered by any ecclesiastical system, whether episcopal or presbyterian. He says: "To make a man in matter of religion engage to believe no otherwise than is believed by my Lord Bishop or Goodman Presbyter is a pedantism, that has made the sword to be a rod in the hands of schoolmasters."[2] He was severe on ministers for political writing. "I wonder why ministers of all men should be perpetually tampering with government. Their honest vocation is to teach children at the schools and the universities and the people in the parishes. The state is concerned to see, that they do not play the part of shrews."[3]

[1] N.Y. Constitution of 1777, art. 39.

[2] Oceana, p. 59.

[3] *Ibid.*, p. 182. — Some of the ministers of Harrington's time certainly had small respect for Cromwell's authority, and seem to have been quite beyond governmental control. Thurloe (Secretary to Cromwell as Protector) gives an account of a discourse by one of them (Rev. Mr. Feake) who preached, at All-Hallows, London, three hours in his presence in 1657. He had been extremely troublesome to the Protector, and had been kept under guard at Windsor Castle in a chamber, but persisted in preaching out of the window while the governor and people were passing from St. George's Chapel. The governor prohibited him, but still he went on. Then, as Feake said, the governor "caused his drum to be beaten to drown the sound of the gospel. Then as soon as the drum had done, I began to sound out my trumpet, and trumpeted out the gospel aloud; he beat up his drum a second and a third time, and still I went on. Then he strictly required me to have done. I told him, I would not. He said he had order to silence me from the Lord Protector. I told him I had orders from my Lord to go on, and *my* Lord's Highness is above *his* Lord's Highness, *etc.* Then, it being nigh noon, he left me and I suppose went to dinner, while I went on preaching the gospel." "Strange government," he adds, "that men's mouths must be stopped from preaching." He was then moved to another castle, whereupon he fell to preaching to the soldiers who guarded him on the way. Finding poor accommodations here, with a pillow of hops (perhaps to lull him to sleep), he chose to lie at night on the boards without pulling off his clothes, and afterwards preached from Nehemiah on the following text: "Neither I nor my brethren nor the men of the guard, which followed me, none of us put off our clothes, save, that every one put them off for washing." "This text," he declares, "was a great comfort to us."

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The subject of primogeniture attracted our author's attention. He did not deem it consistent with republican forms of government. His rule was equality in inheritance among claimants in equal degree of relationship to an ancestor.[1] Primogeniture was well-suited to a monarchy. He puts his arguments into the mouth of Cromwell:

> A man has one son — let him be called. Would he enjoy his father's estate? It is his, his son's, and his son's son's after him. A man has five sons — let them be called. Would they enjoy their father's estate? It is divided among them. . . . If a man shall dispute otherwise, he must draw his arguments from custom and from greatness, which was the interest of the monarchy, not of the family, and we are now a commonwealth. If the monarchy could not bear with such divisions, because they tended to a commonwealth, neither can a commonwealth

Finally, Cromwell being at his wit's end to know what to do with him, named a town near the sea, where he must abide. Of this direction, Feake says: "And he wrote an order all in his own hand to be delivered to me, enjoining me to continue at that place, and not to stir from thence till further order, which order was signed, Oliver P." (Protector). This order stirred Mr. Feake's bile beyond measure. He paid no attention to it, and went up to London. He says: "He, Cromwell, was pleased to appoint me to be my own gaoler. Such an unnatural order was never heard of before." Here he read it to the congregation, and added: "I abhorred to be a prisoner voluntarily to any power in the world. Here was an order from Oliver P., and I sought the scriptures how to relieve myself. At length came into my mind the case of Peter and John in the 4th of the Acts, who being called before the high priest Ananias [*sic!*] and Caiaphas, were by them commanded not to preach in the name of Jesus. Now suppose that either of their Highnesses had sent Peter and John an order, enjoining them to confine themselves to such a village as Sharon or Joppa or the like, and forbear coming to preach at Jerusalem; suppose, I say, an order had come to them on that account, signed by either of their Highnesses, Ananias H. or Caiaphas H., like this with Oliver P., do you think they would have obeyed it and been confined to a village? We find the contrary, for they preached the more boldly in the city of Jerusalem. Then, having my warrant here from the scripture, I resolved for London, notwithstanding the order of Oliver P." Feake proclaimed that the churches were corrupt, and his business was to "rouse and to rattle them." Harrington's feeling towards the political action of ministers must be read in view of such discourses. Incidentally this matter sheds some light on Cromwell's mode of government, in that such a man should be allowed to rant before a large audience and for three hours, apparently in the presence of the Secretary of the commonwealth, without any interruption, except by other ministers. The sympathy of the audience was plainly with Feake. The narrator of this account found trouble in reporting Feake, as he was "far from candle light, and his shoulders were laden with a crowd of women riding over his head on the tops of the seats." — Thurloe's State Papers, by Birch, V, 755. London, 1742.

[1] Oceana, p. 102.

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conceive at such accumulations, because they tend to a monarchy. . . . I confess I marvel much how it comes to pass that we should use our children as we do our puppies, — take one, lay it in the lap, feed it with every good bit, and drown five; nay, yet worse, forasmuch as the puppies are once drowned, whereas the children are left perpetually drowning. Really, my Lords, it is a flinty custom; and all this for his cruel ambition that would raise himself a pillar, a golden pillar for his monument, though he has children, his own reviving flesh and a kind of immortality.[1]

It is a striking illustration of the correctness of his views, that while primogeniture once prevailed in eight of the American colonies, it disappeared in seven of them at the time of the Revolution. In connection with this discussion, he pours out a strain of invective and sarcasm upon the miserable custom then and since prevailing of the interference of parents to make mercenary marriages, which he holds to be pernicious to the commonwealth.

We see the gifts of God and the bounties of heaven in fruitful families through this wretched custom of marrying for money become their insupportable grief and poverty. The tallow of a chandler is soon converted into that beauty which is required for a bride. We insist that our children shall not marry without our consent, not for our tenderness over them, but lest we miss this and that thousand pounds in their fortune; and yet it is a mischief beyond any that we can do to our enemies, in that we persist in making nothing of breaking the affection of our children. . . . Let us so frame our government as to render a homage to pure and spotless love, whereupon the marriage-bed will be truly legitimate, and the race of the commonwealth not spurious.[2]

In all his suggestions the interest of the commonwealth is the specific point of view. To that everything must bend. Political power is an awful responsibility. Magistracy is a trust to be constantly supervised. "As an estate in trust becomes a man's own if he be not accountable for it, so the power of a magistracy not accountable to the people from whom it was received, becoming of private use, the commonwealth loses her liberty."

He is watchful over the smallest detail injurious or dishon-

[1] Oceana, p. 108. [2] *Ibid.*, p. 110.

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orable to the state. He cannot bear to see a decline in culture and refinement. He cannot go along with his compatriots in their despoiling of parks and defilement of cathedrals. The destruction of such ornaments and works of historic interest is really anti-democratic, for the people have a right to them as a means of education. He says:

> There is such a selling, such a Jewish, humor in our republicans, that I cannot tell what to say to it, only this — any man that knows what belongs to a commonwealth, or how diligent every nation in that case has been to preserve her ornaments, and shall see the waste lately made in the woods adjoining to this city [London] which served for the delight and health of it, being cut down to be sold for three pence, will tell you that they who did such things would never have made a commonwealth.

Can it be that the genius of democracy is always and everywhere to be put forward as insensible to park and sylvan beauty?

> But [he continues] the like may be said of the ruin or damage done upon our cathedrals — ornaments in which this nation excels all others. Nor shall this ever be excused upon the score of religion, for though it be true that God dwells not in houses made with hands, yet you cannot hold your assemblies but in such houses, and these are of the best that have been made with hands. Nor is it well argued that they are pompous and therefore profane or less proper for divine service, seeing the Christians in the primitive church chose to meet with one accord in the temple, so far were they from any inclination to pull it down.[1]

It was a bold thing for Harrington to put these words into the mouth of Cromwell, when he must have known that Cromwell was well aware that his soldiers had often without necessity desecrated the churches of the old established faith. It is doubtful whether even his contemporary, Milton, with his grand poetic vision, would have expressed so keen a sense of the Vandalism of the time as Harrington does in this passage.

Harrington is strongly in favor of recreations. Wit and gallantry are not to be proscribed, though care is to be taken to preserve their innocence. No curb should be placed upon the

[1] Oceana, p. 168.

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genius of a people in lawful recreation. He had heard "Protestant ministers in France much blamed, by men that were wise and of their own profession, in that they forbade dancing, a recreation to which the genius of that air is so inclining that they lost many who would not lose that."

Where a commonwealth was rightly "balanced" and conducted by virtuous men, our author had a glorious vision of its possibilities. He argues:

> A government of the right make is a commonwealth for increase. Of those for preservation merely, the roots are narrow, such as do not run, have no fibres, their tops weak and dangerously exposed to the weather, except you chance to find one as Venice planted in a flower pot, and if she grows, she grows top-heavy and falls too. But you cannot plant an oak in a flower pot. She must have earth for her root and heaven for her branches.[1] . . . If your liberty be not a root that grows, it will be a branch that withers.[2] . . . But even if there should be disaster and the hand of God be upon her for her transgressions, she shall mourn for her sins and lie in the dust for her iniquities without losing her manhood.[3] . . . A commonwealth is not made for herself alone, but given as a magistrate of God to mankind for the vindication of common right and the law of nature.[4]

The stimulus to a citizen in a truly organized commonwealth is intense. "She drives her citizens like wedges, there is no way with them but *thorough*, nor end but that glory whereof man is capable by art or nature." [5]

Having completed his scheme, he breaks out into a grand and triumphant strain, in which he shows his affection for England and his faith in her future greatness. Cromwell is represented as making a harangue at the head of his army, and congratulating them on the adoption of the political constitution embodying Harrington's views.

> My dear Lords, Oceana [England] is as the rose of Sharon and the lily of the valley. As the lily among thorns, such is my love among the daughters. She is comely as the tents of Kedar and terrible as an army with banners. Her neck is as the tower of David, builded for an armory,

[1] Oceana, p. 192. [2] *Ibid.*, p. 196. [3] *Ibid.*, p. 189. [4] *Ibid.*, p. 194. [5] *Ibid.*, p. 183.

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whereon there hang a thousand bucklers and shields of mighty men. . . . Arise, Queen of the earth, arise, holy spouse of Jesus, for lo, the winter is past, the rain is over and gone, the flowers appear on the earth, the time for the singing of birds is come and the voice of the turtle is heard in our land. Arise, I say, come forth and do not tarry.

All this outburst of gladness and upspringing of a new and virgin beauty come from his own scheme of government, which, in his fine philosophic simplicity, he regards as perfect.

Excellent patriots [Cromwell is supposed to continue], if the people be sovereign, here is that which establishes their prerogative; if we be sincere, here is that which disburdens our souls and makes good all our engagements; if we be charitable, here is that which embraces all parties; if we would be settled, here is that which would stand and last for ever.

As has been already seen, Harrington's scheme demands that it should be launched by Cromwell, as sole legislator, who must voluntarily lay down his power as protector, to become at most the president of a commonwealth. To induce him to take such a step of self-abnegation, Harrington seeks to dazzle him with his prospective glory and the filial affection of his grateful fellow-citizens.

He shall walk the streets with a switch, while the people run after him and pray for him; he shall not wet his foot; they will strew flowers in his way. He shall sit higher in their hearts and in the judgment of all good men than the kings that go up stairs to their seats; he has two or three hundred thousand men, that when you say the word, shall sell themselves to their shirts for him and die at his feet.

Is this not the first note of the mighty refrain heard in our own day? —

We are coming, Father Abraham, three hundred thousand more.

The next sentence, as applied to a faithful republican ruler, is equally prophetic:

His pillow is of down and his grave shall be as soft, over which they that are alive shall wring their hands, and the eyes of the people are as the showers of autumn.

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Assuming that Cromwell pursues his suggestion, he looks forward to the fiftieth year of a successful republic, when the great legislator is made to die at the ripe age of 116, and a monument is erected to his memory by his grateful fellow-citizens in the form of an equestrian statue in the plaza in front of Westminster Hall, on the pedestal of which are inscribed the words: "The father of his country, invincible in the field, inviolable in his faith, unfeigned in his zeal, immortal in his fame, the greatest of captains, the best of princes, the happiest of legislators, the most sincere of Christians, who setting the kingdoms of earth at liberty, took the kingdoms of heaven by violence." What a contrast between this supposed national tribute and the actual destiny of the desecrated head, placed a few years later upon a pole on this very Westminster Hall, the object of derision and vile jests, as it slowly went through the process of decay!

How it would have gladdened the eyes of this wise old philosopher and sterling patriot if he could have prolonged his life for a hundred or more years, and could have followed, with eager and intensely loving gaze, the deeds of those men of his own race who, to enjoy the privileges he had held out to them as appertaining to a commonwealth, had crossed the sea and subdued a wilderness to the arts of peace! He would have seen a great general, having all the virtues attributed by him to the mighty Cromwell, doing what he had suggested, laying down his victorious arms and dismissing from service his devoted army to frame a constitution and become the president of a commonwealth. By and by he would have seen this man quietly push aside the presidential power and withdraw into the ranks of private citizenship, lending thus the weight of his example to Harrington's rule — that it is well to be governed as well as to govern. And when this nobler Cromwell — this man after Harrington's own heart — lay dying in the little back room in his family mansion, his last gaze resting upon the noble and tranquil river that flowed forward as peacefully as his own life ebbed away, our philosopher would in his mourning rejoice to know that the eyes of millions of grateful people

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"became as the showers in autumn." Had it been Harrington's good fortune to address a Washington instead of a Cromwell, it is not impossible that the course of the world's history would have been changed.

We can spend but a moment in gathering up some of the lessons fairly to be derived from these remarkable treatises. The prime feature of Harrington's scheme is that a government can be made to run forever, if there is only good machinery, well oiled, and of the most improved pattern. Make a perfect equilibrium of forces on paper, regulate the ownership of land, cause your magistrates to rotate in office, cast your suffrages by secret ballot, have a well-drawn constitution, with all the powers of government sharply defined and vested in distinct persons, and your government, once set in motion, must go on forever. Alas, we have tried nearly all of these, and is our system of government yet perfect or absolutely secure? We have had the so-called secret ballot this hundred years; we have rotated our magistrates with the most perfect regularity; we have had an admirable constitution. All these are of admitted value. And yet, can it be said with truth that we confide in them as an absolute security? With them we have passed with difficulty and sorrow through the most tremendous civil war the world has ever seen. We have seen abundance of corruption in office, and fraud in the ballot box. We are conscious of dangerous forces in society which none of these political devices have any tendency to remove. We must, as thinking men, pause and inquire whether we are not too fondly reposing for our security on constitutional checks and limitations. The ruling idea of many is substantially this: If a legislature is foolish or corrupt, make it wise and pure by shackling it with constitutional restrictions. In some of the states the legislative power is almost choked, so tightly drawn are these leading-strings. By and by they will have to be relaxed, and the old evils will return. A qualifying feature of Harrington's work must not be forgotten in forming a correct estimate of its value. It was all along assumed by him that his cherished constitution would only be managed by such men as he saw around him, and such

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as he himself was, fearing God, hating covetousness. "The saintship of a people as to government consists in the election of magistrates fearing God and hating covetousness. It consists in making the most prudent and religious choice men can."[1] There must be men of a nice sense of honor, of burning patriotism, high intelligence, ready and persuasive speech, moderation in action, and undaunted courage. This is the pattern of a true gentleman; and Harrington held men of this pattern to be absolutely necessary in a constitutional commonwealth as legislators, generals, and judges. We have advanced little further than this to-day. The perfect democratic government must build on fundamental principles. These belong not to men, nor to nations, nor to human laws. "To build upon such principles as are apparently laid by God in the inevitable necessity or law of nature is that which truly appertains to men, to nations, and to human laws. To make any other fundamentals, and then to build upon them, is to build castles in the air."[2] Having a well-framed constitution that recognizes these natural forces and holds them in due equilibrium, it must be managed by men of intelligence, honor, and virtue. The great problem, then, to be solved in the United States, as Harrington would hold were he here, is this: How is it possible, at regularly recurring intervals for an indefinite period, to bring the right men to the conduct of affairs? If this problem shall prove insoluble, democratic government will end. To plead that good men are sufficient to carry on a government permanently without good laws is the cry of a demagogue; to insist that good men are essential to give life and vitality to good laws is the utterance of a statesman.

The main requirement in a republic for the continual generation of good men to hold office is the conviction of the people that such men are necessary to their welfare. If there is a constant demand, there will, according to laws in general operation, be a sufficient supply. In this way, under God, the people have their destinies in their own hands. Physical nature has not degenerated in these later years, nor has wisdom nor virtue died

[1] Oceana, p. 75. [2] Political Aphorisms, p. 520.

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out of the intellect or soul of man. There must be summoned to our aid correct methods and breadth of education; the influence of morals and religion; high culture, including the development of that sense of delicacy and honor which, in Harrington's words, prevents a man from carving for himself at the public table; and a positive patriotic spirit which impels him to use all legitimate efforts actively to promote the general good. These are not impossible virtues or qualities. It is the part of good men to stimulate and encourage their juniors by every reasonable effort to emulate the wisdom and virtues, both public and private, of such men as James Harrington and John Milton; the one a mild and the other an austere republican, but each animated and supported in the most trying circumstances, whether public or domestic, by the noblest principles that control human action, and by a passionate though rational attachment to the country which gave him birth. If men such as these can be reproduced from time to time, and receive the confidence of the people, the republic, like the glorious luminaries to which our author loved to refer, may go onward with steady and melodious motion forever.

It will be well, in concluding this paper, to summarize Harrington's leading views.

1. A commonwealth should be an "empire of laws and not of men."

2. In a republic, land should be much subdivided, and there should be a large number of freeholders. Great landed estates should be discouraged as adapted to monarchical rather than to republican institutions.

3. Political liberty consists in the empire of law and not in the mere existence of freedom. Yet no one obtains his liberty *from* the law, but rather holds it *by* the law.

4. There is a natural aristocracy among men. Members of this class will in the end emerge from the masses and control public affairs. The leading function of such men is to discuss and disclose political truth which in the end their fellow-citizens will recognize and adopt.

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5. Government derives its *just* powers from the consent of the governed.

6. There should be a written constitution limiting the sovereign power of the people. This constitution should be adopted by the people.

7. The powers of government are threefold: legislative, executive, and judicial. These should be vested in different persons.

8. There should be two houses of Parliament, one more numerous than the other, and the members should be chosen by the people in convenient districts.

9. A legislative body should have a continuous life, though its membership should gradually change by means of a regular plan. This plan is that of "partial rotation," whereby, for example, one-third of the number might go out of office annually or biennially. This scheme unites gradual change of membership with continuity of the existence of the body itself. This plan may be extended to other political organizations.

10. Elections should take place by ballot. The ballot must be secret, and suitable laws devised to preserve its purity. "The suffrage is the health, if not the life of the state. By it the soul is breathed into the sovereign power."

11. The commonwealth should not engage in war without the consent of the senate and the people.

12. Those who govern must be at times in the condition of the governed. In other words, the magistracy must from time time return to the body of the people. Life tenure is not admissible.

13. Equality before the law is the life blood of a commonwealth. Still, the government will not be well administered unless gentlemen are at its head. By gentlemen are meant not merely men of rank or wealth, but men of a nice sense of honor, sterling patriotism, and earnest in rendering disinterested service to the commonwealth. Proper measures must be taken to induce the citizens to choose such men.

14. There should be gratuitous education for the masses, if necessary. It should also be compulsory, if not voluntarily accepted. This is in the interest of the commonwealth. Uni-

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versity education must be encouraged for those who can profit by it.

15. Public affairs must be administered in a broad and liberal spirit. Salaries should be commensurate with the service rendered. There should be no penny-wise economy. The element of beauty is not to be neglected.

16. There must be liberty of conscience for all Protestant Christians. No distinction should be made between members of the various Protestant sects as to freedom in worship, and the right to hold office. "Without liberty of conscience, civil liberty cannot be perfect; without civil liberty, liberty of conscience cannot be perfect."

17. Primogeniture in the descent of land is not suited to a republic.

18. Mercenary marriages are odious in a free commonwealth.

19. Public office is a public trust, and the magistracy should at all times be accountable to the people for their management of public affairs.

20. Prisoners charged with state crimes are entitled to be heard by counsel.[1]

21. The great end and aim of a commonwealth is the vindication of common right and the upholding of the law of nature. Rightly organized, it supplies its citizens an intense stimulus for thorough and honest work.

22. Ministers of the gospel should not hold office. Political activity might tend to corrupt them, or to corrupt religion. Their disability to hold office should be established by law.

23. There should be public parks and other lawful means of recreation provided for the people. The despoiling of parks and noted public buildings is not admissible, in general, even

[1] In this matter, as elsewhere, Harrington works out his theory to the last practical detail. In a state trial, the counsel for the plaintiff, or accuser, standing upon the right hand of the court, shall speak one hour and a half by the hour glass, and no longer. While papers are read, or witnesses examined, the sands are not to run. The accused, standing on the left, and *appearing if he will by counsel*, is governed by the same rules. This is a remarkable provision in the interests of justice, for prisoners under criminal charges could not appear in an English court by counsel having the right to speak in their behalf, until long after Harrington's time.

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in time of war. Ministers who discountenance dancing and other amusements not in themselves harmful, act unwisely.

24. In a republic, a great general, or a great magistrate should, after a time, voluntarily, when the interests of the commonwealth admit of it, lay aside office and retire to private citizenship. Let him testify that the sovereignty and welfare of the people are greater than the claims of any citizen, however eminent or meritorious.

25. Government needs not only well-devised schemes, but the most prudent and religious choice of public servants that can possibly be made.

THEODORE W. DWIGHT.

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THE LIMITS OF COMPETITION.

THERE is a sense in which much of the orthodox system of political economy is eternally true. Conclusions reached by valid reasoning are always as true as the hypotheses from which they are deduced. If we admit the fact of unlimited competition, we concede in advance many doctrines which current opinion is now disposed to reject. This refuge will always be open to the latter-day defenders of the faith, as they are confronted by greater and greater discrepancies between their system and the facts of life; it will remain forever true that if unlimited competition existed, most of the traditional laws would be realized in the practical world. It will also be true that in those corners of the industrial field which still show an approximation to Ricardian competition there will be seen as much of correspondence between theory and fact as candid reasoners claim. If political economy will but content itself with this kind of truth, it need never be disturbed by industrial revolutions. The science need not trouble itself to progress.

This hypothetical truth, or science of what would take place if society were fashioned after an ideal pattern, is not what Ricardo believed that he had discovered. His system was positive; actual life suggested it by developing tendencies for which the scientific formulas which at that time were traditional could not account. It was a new industrial world which called for a modernized system of economic doctrine. Ricardo was the first to understand the situation, to trace the new tendencies to their consummation, and to create a scientific system by insight and foresight. He outran history in the process, and mentally created a world more relentlessly competitive than any which has existed; and yet it was fact and not imagination that lay at the basis of the whole system. Steam had been utilized, machines were supplanting hand labor, workmen were migrating to new centres of production, guild regulations were giving way,

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and competition of a type unheard of before was beginning to prevail.

A struggle for existence had commenced between parties of unequal strength. In manufacturing industries the balance of power had been disturbed by steam, and the little shops of former times were disappearing. The science adapted to such conditions was an economic Darwinism; it embodied the laws of a struggle for existence between competitors of the new and predatory type and those of the peaceable type which formerly possessed the field. Though the process was savage, the outlook which it afforded was not wholly evil. The survival of crude strength was, in the long run, desirable. Machines and factories meant, to every social class, cheapened goods and more comfortable living. Efficient working establishments were developing; the social organism was perfecting itself for its contest with crude nature. It was a fuller and speedier dominion over the earth which was to result from the concentration of human energy now termed centralization.

The error unavoidable to the theorists of the time lay in basing a scientific system on the facts afforded by a state of revolution. This was attempting to derive permanent principles from transient phenomena. Some of these principles must become obsolete; and the work demanded of modern economists consists in separating the transient from the permanent in the Ricardian system. How much of the doctrine holds true when the struggle between unequal competitors is over, and when a few of the very strongest have possession of the field? Can the old-time competition be trusted to divide the fruits of industry between one overgrown shop and another, and between the owners and the workmen in each? Can this same force control railroads, as it once controlled stage-coaches and packet-sloops? To be more accurate, are the transactions of consolidated railroad lines governed by the same principles as those of single railroads and stage-coach lines when these are competing with each other? Does the old regulating principle at present exist, and will general well-being continue to evolve itself under its unaided influence? An economic system

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adapted to the modern era must begin by answering these questions.

In most branches of manufacturing, and in other than local transportation, the contest between the strong and the weak is either settled or in process of rapid settlement. The survivors are becoming so few, so powerful, and so nearly equal that if the strife were to continue, it would bid fair to involve them all in a common ruin. What has actually developed is not such a battle of giants, but a system of armed neutralities and federations of giants. The new era is distinctively one of consolidated forces; rival establishments are forming combinations, and the principle of union is extending itself to the labor and the capital in each of them. Laborers, who once competed with each other, are now making their bargains collectively with their employers. Employers, who under the old *régime* would have worked independently, are merging their capital in corporations, and allowing it to be managed as by a single hand. We need Ricardo's insight and foresight if we are to attain the economic laws that are to govern the transactions of the practical world. The changes which we are witnessing are as startling in character as those which he witnessed, and are on a scale of greater magnitude. There is this difference between his scientific position and ours, namely, that he saw before him an interval of contest that must of necessity, sooner or later, come to an end; while we see approaching a period of union which gives a promise of indefinite continuance. He studied the evolution that created a type of industrial establishment; we have to study the functions of this surviving type. History will aid us by furnishing a point of departure, and by indicating the direction of social development, but not by giving facts from which any possible induction can give the principles which we seek. The light derivable from past facts is negative; that derivable from present tendencies is positive. The materials for study lie in the present and the immediate future; and, to be scientific, we must be somewhat prophetic.

Predatory competition between unequal parties was the basis of the Ricardian system. This process was vaguely conceived

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and never fully analyzed; what was prominent in the thought of men in connection with it was the single element of struggle. Mere effort to survive, the Darwinian feature of the process, was all that, in some uses, the term competition was made to designate. Yet the competitive action of an organized society is systematic; each part of it is limited to a specific field, and tends, within these limits, to self-annihilation.

An effort to attain a conception of competition that should remove some of the confusion was made by Professor Cairnes. His system of "non-competing groups" is a feature of his value theory, which is a noteworthy contribution to economic thought. Mr. Mill had followed Ricardo in teaching that the natural price of commodities is governed by the cost of producing them. Professor Cairnes accepts this statement, but attaches to it a meaning altogether new. He says, in effect:

> Commodities do indeed exchange according to their cost of production; but cost is something quite different from what currently passes by that name. That is merely the outlay incurred by the capitalist-employer, for raw materials, labor, *etc.* The real cost is the personal sacrifice made by the producing parties, workmen as well as employers. It is not a mercantile but a psychological phenomenon, a reaction upon the men themselves occasioned by the effort of the laborer and the abstinence of the capitalist. These personal sacrifices gauge the market value of commodities within the fields in which, in the terms of the theory, competition is free. The adjustment takes place through the spontaneous movement of capital and labor from employments that yield small returns to those that give larger ones. Capital migrates freely from place to place and from occupation to occupation. If one industry is abnormally profitable, capital seeks it, increases and cheapens its product, and reduces its profits to the prevailing level. Profits tend to a general uniformity.

Wages are said to tend to equality only within limits. The transfer of labor from one employment to another is checked by barriers.

> What we find, in effect [continues Professor Cairnes], is not a whole population competing indiscriminately for all occupations, but a series of industrial layers, superimposed on one another, within each of which the various candidates for employment possess a real and effective power of

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selection, while those occupying the several strata are, for all purposes of effective competition, practically isolated from each other. We may perhaps venture to arrange them in some such order as this: first, at the bottom of the scale there would be the large group of unskilled or nearly unskilled laborers, comprising agricultural laborers, laborers engaged in miscellaneous occupations in towns, or acting in attendance on skilled labor. Secondly, there would be the artisan group, comprising skilled laborers of the secondary order, — carpenters, joiners, smiths, masons, shoemakers, tailors, hatters, *etc.*, *etc.*, — with whom might be included the very large class of small retail dealers, whose means and position place them within the reach of the same industrial opportunities as the class of artisans. The third layer would contain producers and dealers of a higher order, whose work would demand qualifications only obtainable by persons of substantial means and fair educational opportunities; for example, civil and mechanical engineers, chemists, opticians, watchmakers, and others of the same industrial grade, in which might also find a place the superior class of retail tradesmen; while above these there would be a fourth, comprising persons still more favorably circumstanced, whose ampler means would give them a still wider choice. This last group would contain members of the learned professions, as well as persons engaged in the various careers of science and art, and in the higher branches of mercantile business.

It is essential to the theory that not only workmen but their children should be confined to a producing group. The equalizing process may take place even though men do not actually abandon one occupation and enter another; for there exists, in the generation of young men not yet committed to any occupation, a disposable fund of labor, which will gravitate naturally to the occupations that pay the largest wages. It is not necessary that blacksmiths should ever become shoemakers, or *vice versa*, but only that the children of both classes of artisans should be free to enter the trade that is best rewarded.

Professor Cairnes does not claim that his classification is exhaustive, nor that the demarcation is absolute:

> No doubt the various ranks and classes fade into each other by imperceptible gradations, and individuals from all classes are constantly passing up or dropping down; but while this is so, it is nevertheless true that the average workman, from whatever rank he be taken, finds his power of competition limited for practical purposes to a certain range of

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occupations, so that, however high the rates of remuneration in those which lie beyond may rise, he is excluded from sharing them. We are thus compelled to recognize the existence of non-competing industrial groups as a feature of our social economy.

It will be seen that the competition which is here under discussion is of an extraordinary kind; and the fact that the general term is applied to it without explanation is a proof of the vagueness of the conceptions of competition with which acute writers have contented themselves. Actual competition consists invariably in an effort to undersell a rival producer. A carpenter competes with a carpenter because he creates a similar utility, and offers it in the market. In the theory of Professor Cairnes the carpenter is the competitor of the blacksmith, because his children may enter the blacksmith's calling. In the actual practice of his own trade, the one artisan in nowise affects the other. It is potential competition rather than actual that is here under discussion; and even this depends for its effectiveness on the action of the rising generation.

Cost, in the sense of personal sacrifice, governing prices within the fields in which potential competition exists, is the summary of this noteworthy theory. The criticism to be made upon it is that the application of its more fundamental principle, that which connects the prices of commodities with the sacrifices involved in producing them, has an application that is far wider than the author of the theory supposed, and wider than it had, in fact, in European countries at the time when he published his work. The limitations which he imposed on the action of this principle are no longer necessary, and the fourfold grouping of laborers according to their personal qualities no longer corresponds with anything in actual life.

Modern methods of production have obliterated Professor Cairnes' dividing lines. Potential competition extends to every part of the industrial field in which men work in organized companies. Throwing out of account the professions, a few trades of the highest sort, and the class of labor which is performed by employers themselves and their salaried assistants, it is practically true that labor is in a universal ebb and flow; it

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passes freely to occupations which are, for the time being, highly paid, and reduces their rewards to the general level.

This objection to the proposed grouping is not theoretical. The question is one of fact; it is the development of actual industry that has invalidated the theory which, ten years ago, expressed an important truth concerning economic relations in England. Moreover, the author of the theory anticipated one change which would somewhat lessen its applicability to future conditions. He recorded his belief that education would prove a leveller, and that it would merge to some extent the strata of industrial society. The children of hod-carriers might become machinists, accountants, or lawyers when they could acquire the needed education. He admitted also that new countries afford conditions in which the lines of demarcation are faint. He was not in a position to appreciate the chief levelling agency, namely, the machine method of production as now extended and perfected. Education makes the laborer capable of things relatively difficult, and machines render the processes which he needs to master relatively easy. The so-called unskilled workmen stand on a higher personal level than those of former times; and the new methods of manufacturing are reducing class after class to that level. Mechanical labor is resolving itself into processes so simple that any one may learn them. An old-time shoemaker could not become a watchmaker, and even his children would have found difficulties in their way had they attempted to master the higher trade; but a laster in a Lynn shoe factory can, if he will, learn one of the minute trades that are involved in the making of a Waltham watch. His children may do so without difficulty; and this is all that is necessary for maintaining the normal balance between the trades.

The largest surviving differences between workmen are moral. Bodily strength still counts for something, and mental strength for more; but the consideration which chiefly determines the value of a workman to the employer who entrusts to him costly materials and a delicate machine is the question of fidelity. Character is not monopolized by any social class; it

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is of universal growth, and tends, by the prominent part which it plays in modern industry, to reduce to their lowest terms the class differences of the former era.

The rewards of professional life are gauged primarily by character and native endowment, and are, to this extent, open to the children of workmen. New barriers, however, arise here in the ampler education which, as time advances, is demanded of persons in these pursuits; and these barriers give to a part of the fourth and highest class in the scheme that we are criticising a permanent basis of existence. Another variety of labor retains a pre-eminence based on native adaptations and special opportunities. It is the work of the employer himself. It is an organizing and directing function, and in large industries is performed only in part by the owners. A portion of this work is committed to hired assistants. Strictly speaking, the *entrepreneur*, or employer, of a great establishment is not one man, but many, who work in a collective capacity, and who receive a reward that, taken in the aggregate, constitutes the "wages of superintendence." To some members of this administrative body the returns come in the form of salaries, while to others they come partly in the form of dividends; but if we regard their work in its entirety, and consider their wages in a single sum, we must class it with *entrepreneur's* profits rather than with ordinary wages. It is a different part of the product from the sum distributed among day-laborers; and this fact separates the administrative group from the class considered in our present inquiry. Positions of the higher sort are usually gained either through the possession of capital, or through relations to persons who possess it. Though clerkships of the lower grade demand no attainments which the children of workmen cannot gain, and though promotion to the higher grades is still open, the tendency of the time is to make the transition from the ranks of labor to those of administration more and more difficult. The true laboring class is merging its subdivisions, while it is separating more sharply from the class whose interests, in test questions, place them on the side of capital.

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If we consider individuals of the higher group, we shall find that the grounds for classifying them separately from wage-workers are not always distinct. It may be doubtful whether a particular man should be rated as a workman, or as a subordinate member of the employer's staff. In the case of responsible managers this uncertainty disappears. The manager of a great manufactory does what is clearly identified as *entrepreneur's* work, and receives a reward which, in the minds of those who pay it, stands in a recognized ratio to the product which is secured by his efficiency. Such a man is identified with employers in interest, acts with them when labor conflicts arise, and carries with him the staff of assistants who help to execute his plans and, in some degree, share his fortunes. Here lies the essential distinction between salaried labor and the true wage-labor to which our inquiry is now confined.

America affords the conditions most favorable to the levelling process which is reducing the workman proper to a single social stratum. To this extent our democracy has an economic basis. Free education and native versatility elevate the lower substrata, while machine processes depress the higher. High general wages assist, by placing within the reach of the children of the state that modicum of training which opens many callings to their selection. The barriers that separated wage-earners into broad non-competing strata are, to all intents and purposes, things of the past.

Art may create barriers where nature has destroyed them. The concerted action of men may set in motion aristocratizing influences, where a natural evolution would lead to democracy. Trades unions may obstruct the transfer of labor from one occupation to another, and create a partial monopoly of favored employments. Restrictions on apprenticeships like those which prevailed among the mediæval guilds might, if carried far enough, erect a palisade around each of the minute trades which the factory system has developed, and substitute for the general strata of former times an artificial grouping far more undemocratic in its practical working. Labor organization has in fact taken this course, to an extent that produces appreciable effects

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on relative wages. The boy who has both time and ability to learn a trade is not always permitted to do so; and hence arises the need of trade schools, especially in self-governing countries. It is an important question whether the principle of equality and consequent fraternity is to prevail over the artificial tendency to exclusiveness and antagonism. In the long run and in the general field it must prevail; the forces in its favor are too powerful to be resisted. The education which increases men's working ability, the change of method which makes less and less demands on that ability, supplemented by the public sentiment that revolts at the policy of denying to men the opportunity to do what they can for themselves and for society, will keep within bounds the effort to monopolize skill by reviving guild regulations. Trades unions may, for some time, interpose obstacles to the free transfer of labor to the points of greatest demand, which is the potential competition of Professor Cairnes' theory; but, in the long run, causes beyond arbitrary control will keep this movement nearly free.

It is not workmen but employers who have erected the chief artificial barriers against competition. A startling recent development is the system of combinations by which producers of particular articles have attempted arbitrarily to control the supply and the market value of their respective products. This apparently wholesale abrogation of economic law was unthought of by early economists; and although in Professor Cairnes' time the pooling process had begun, even he regarded capital as in a universal ebb and flow, ready to move spontaneously to the point where it could gain the largest returns. Toward the close of what we have termed the century of transition, producers' combinations appeared on a large scale; and very lately they have stolen a forced march upon economists. While we slept, as it were, and dreamed of the regulation of values by the automatic flow of capital to the points of highest profit, the principle apparently ceased to operate within very extensive fields. It would be easy to name a hundred staple articles, like glass, wall-paper, cut nails, screws, files, spool silk, anthracite coal, steel rails, *etc.*, of which the supply and the market

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value are fixed by agreement by strong associations of producers. The scientific significance of this transition is a question for immediate study. Have we come unconsciously under a *régime* of arbitrary values? Is the old regulating principle, competition, abrogated? Is it subject to disturbances so vast and uncertain as to baffle scientific calculation?

The practical inquiry must be guided here as elsewhere by a study of principles. Combinations have their roots in the nature of social industry and are normal in their origin, their development, and their practical working. They are neither to be deprecated by scientists nor suppressed by legislators. They are the result of an evolution, and are the happy outcome of a competition so abnormal that the continuance of it would have meant wide-spread ruin. A successful attempt to suppress them by law would involve the reversion of industrial systems to a cast-off type, the renewal of abuses from which society has escaped by a step in development. Combinations are to be accepted, studied, and, probably, regulated; they ought not to be suppressed if such action were practicable. This action is fortunately not practicable except in the early stages of their growth, while their form is still crude, and while the initial difficulties of the system are great. The repressive policy may then, for a time, succeed; but it must be at the cost of social retrogradation and economic loss.

Modern production is not an individualistic process; it is the act of society as a whole, and each separate man in the ranks finds his function narrowly limited. Parts of the productive operation are assigned to sub-organizations, and these are subjected to a discipline which limits each member to an infinitesimal part of general industry. He may be one of a group that collectively cuts trees, or of another that saws logs, or of another that fashions lumber into furniture. The chair that a primitive settler would have hewn out with an axe is the product of one of the numerous sub-organisms of society. The relations of these sub-organisms to each other, though intricate, are capable of clear analysis. We select a typical one for study, and, to avoid confusion, consider no relations that are not essential to

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our present purpose. Crudely represented, the furniture-making group arranges itself as follows:

Finishing
Cabinet making
Transporting
Lumber dealing
Wood cutting

Each stratum shows a subdivision into capitalists and workmen; and in each case there range themselves on the side of the capitalists a few men of managing ability, who constitute with their employer a sort of collective *entrepreneur*, and whose rewards, in the form of salaries, have more in common with profits than they have with wages.

True competition is limited by nature to the strata here indicated; cutters compete only with cutters, lumber dealers with lumber dealers, *etc.* The distinction between this grouping and that of Professor Cairnes consists, not in the fact that the classification here proposed follows the lines of occupation, but in the fact that it is based on real and not on potential competition. Whether a workman can or cannot transfer himself from one sub-group to another is a question which we do not raise. We inquire simply with whom he competes while remaining in his own group and continuing to discharge his special function. In this lies the practical fruit to be gained by a study of the grouping. As bearing on the direct adjustment of relative wages, the question to be considered is: Whether wood-cutters are potential competitors of furniture makers, *etc.;* whether they or their children have such a choice of occupations open to them that the rewards of all tend toward a general uniformity? As bearing on the question which we are now considering, the point to be studied is: What groups of men are brought into competition with each other by the nature of their industrial functions, and what consequences result from this grouping? It is to be noted, moreover, that in the sale of commodities, finished or unfinished, the competition is not between

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workmen, nor between employers, separately considered, but between industrial establishments in their entirety. One furniture manufactory as a whole competes with another. Each is an organism in itself; and although the employer in each case becomes the owner of the product, and places it in his own name upon the market, yet his relations with his men are such as to make them partners in the sacrifice which creates the product, and in the rewards derived from it. It is the efficiency of both workmen and employers, and the relations between the two, that determine the competing ability of an industrial establishment. Competition in the sale of commodities is limited to establishments of the same sub-class; it is confined by nature within horizontal lines like those which, in the case of one representative group, we have indicated in the foregoing diagram.

These sub-groups are now solidifying. Within many of the pairs of parallel lines competition has exterminated the weak producers, and becoming fiercer as the survivors become fewer and stronger, is compelling them, in the end, to unite or perish. "Let us have peace" has become the watchword in this part of the field; and the truce which has ensued has taken the form of a system of producers' combinations.

These unions aim to fix prices and, as a means thereto, to restrict production. The one process limits actual competition, and the other potential. To decide upon a price list, and to abide by it, is to allay the rivalry between similar producers; to restrict production is to disturb the relations between dissimilar producers. An arbitrary restriction upon the amount of a commodity which can be placed upon the market checks the enlargement of the industry, and thus obstructs the transfer of labor and capital from group to group — which is the potential competition of Professor Cairnes' theory. Could each group solidify into a corporation that could control its members within and suppress rivalry without, the whole industrial field would become definitely non-competitive. The old regulator of values would be lost, and the appeal for state intervention would acquire great force. The study of the coming interval is that of

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the principles which make a general appeal of this kind unnecessary. It is the study of competition in residual forms. The process is taking on an advanced type, less simple than that of earlier times, and more legitimate than that which has lately developed. Residual competition of the actual kind subsists between productive establishments of comparatively equal strength in combination with each other; and residual competition of the potential kind is maintained between the entire combination and the remainder of society. The members of the pool are still rivals; and capital and labor may still transfer themselves to and from the industry which they try to control. Monopoly prices have not been long maintained by any of these organizations; and this fact is due, not to chance, but to complex and interesting economic laws. Leaving the discussion of these principles to one whose analysis derives weight from practical observation, I close this paper with a brief reference to the conditions which determine the transition from the era of predatory competition to that of union.

If each industry were represented by a diagram like the one by which we have rudely shown the relation of sub-classes in the furniture-making group, it would be found that the horizontal lines which bound the fields of competition bound also those of combination. The combining groups are the natural competing groups of industrial society. The limitation of these fields is important. The fewer are the competitors, the fiercer is the strife and the greater is the need of union. The fewer are the competitors, the easier is the pooling process. The effect of the union is to turn the belligerent energies of society in a new direction. Under the old system it was rival producers that destroyed each other; under the new system it is producers of dissimilar articles whose interests come into overt conflict. To limit the supply and raise the price of a commodity is to make members of other producing groups give for it an increased proportion of their own products; and if this attempt is met by a similar proceeding on their part, there results an industrial war, the battles of which are fought across the horizontal lines, instead of between them. If unions were general, the lumber-

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men of the foregoing diagram would cease to attack each other, and collectively do battle with the transporters and furniture makers. Treaties of alliance on the old battle-ground, hostility at the point of former amity, — such are the results of the transition to the new system. The field of economic war and the nature of the belligerent process are both changed.

Combinations are the product of a social evolution, and can have no permanent existence until the Darwinian contest between the weak and the strong has completed its work. The surviving competitors must be few, strong, and nearly equal. Marked inequalities of strength among the members of the group defer the formation of the union, or break it when it is formed prematurely. Rivals do not combine so long as one is conscious of the power to exterminate the other. Moreover, strength for such a contest consists not merely in the size of a producing establishment, although that is an element to be considered; it consists primarily in advantages for economical production. Location is important, but the paramount influence is the mastery of cheap methods. Natural selection locates industries in the most favorable localities, and brings them to some equality in method; and until this is done there is no chance for an economic truce.

In agriculture the number of competitors bars the way for the formation of unions. It is to be noted that the prices of food products are especially sensitive to changes in supply; and if a combination could restrict the crops uniformly and very moderately, it could force the members of other industrial departments to pay double or quadruple prices for the means of living. Against such a calamity the nature of the agricultural industry interposes its bar. Anthracite coal is somewhat like a food product in its importance, and in the variations which the price undergoes in consequence of changes in the supply. Coal-mining affords strong inducements and exceptional facilities for the pooling process, and it is here that the effects of union are especially harmful to society. That the injury thus far done has not been greater than it has been is due to residual competition, though it has worked under unusual disadvantages.

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The value of this regulating agent under favorable circumstances must be indefinitely greater.

Portability in the commodity produced is essential to the formation of a combination on a national scale. The large establishment must be able to reach with its product the entire territory, and that without incurring a cost for transportation which would prevent it from underselling the small local producers. Baskets are made with great economy in a large shop; but their bulk subjects them to a cost for transportation that enables the local manufacturers, though working with less economy, to hold their respective fields, and defeats the formation of a union in this industry. In the silk manufacture the freight costs practically nothing, and the mill which produces cheaply has at its command all parts of the national territory to which its agents choose to travel. The silk industry offers, in this respect, a favorable field for combination. Moreover, cheapness of transportation depends not only on the nature of a product, but also on the development of an efficient railroad system. The low rates for freight now prevailing in this country have done much to create combinations among manufacturers; if pools among the railroads themselves were to restore the former cost of transportation, they would undo this work. The economic war between transporters and other groups of industrial society promises to result so favorably to the other groups as to facilitate combinations among them.

In but few instances has the principle of union among producers shown a capacity to cross national lines; and in so far as a protective tariff debars the foreigner from being an efficient competitor within the limits of a country, it hastens the formation of pools within those limits. In any case foreign competition acts as a check upon the raising of prices after a combination has been formed.

The industrial world would seem to be dividing into two portions, in one of which, embracing the most important of all forms of production, namely, that of agriculture, the principle of individual competition continues, and produces results so beneficial to society as to justify the enthusiasm of the early

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economists for competition as a regulator of values and a divider of the fruits of industry. In the other economic division, embracing transportation and a majority of manufactures, the principle of combination is asserting itself, and introducing a *régime* in which prices are regulated by competition in latent and residual forms. Whether these surviving types of competition are so nearly adequate to the regulating work which must be done that no state action is called for, is a debatable question. Whether state action should take the form of a legal suppression of combinations is a question which a brief trial of such a policy would place beyond the debatable line. To regulate combinations is possible and, in some directions, desirable; to permanently suppress them is impossible; to temporarily repress them is either to force them into illegal forms, or to restore the internecine war from which a natural evolution has delivered us. To accept the results of this evolution and to meet the demands of the new era is the part of wisdom.

JOHN B. CLARK.

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THE PERSISTENCE OF COMPETITION.

THE late Walter Bagehot probably knew the "market" better than any other thinker who has grappled with theoretical questions of political economy. This fact lends weight to his views of the present, past, and future of competition, as presented in those luminous essays on *The Postulates of English Political Economy*, written just before his death. John Stuart Mill had said that "only through the principle of competition has political economy any pretension to the character of a science," [1] — a dictum that compressed into a sentence the economic system of Ricardo, James Mill, Senior, and McCulloch. John Stuart Mill himself distinctly recognized the hypothetical character of this system, and in the chapter on "Competition and Custom" he undertook to show that it was only the wholesale trade and the great articles of commerce that were really under the dominion of competition. At the same time he asserted that the influence of competition was "making itself felt more and more through the principal branches of retail trade in the large towns," and that "the rapidity and cheapness of transport, by making consumers less dependent on the dealers in their immediate neighborhood," were "tending to assimilate more and more the whole country to a large town." Mr. Bagehot, bringing to his investigations a rare mastery of deductive reasoning, a breadth of view gained by many excursions into the domains of history and physical science, and the worldly sagacity of a practical business man of Lombard Street, became convinced that the fundamental postulates of English political economy, besides being only hypothetically true for a great portion of modern European society, were not true at all for uncivilized and semi-civilized societies, nor for European societies in their primitive eras. His demon-

[1] Principles of Political Economy, chapter on Competition and Custom, second paragraph.

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stration that in the undeveloped society there is no free transferability of labor was based largely on the researches of such investigators as Sir Henry Sumner Maine; but his demonstration that capital was not so transferable until very recent times, and in modern times is so transferable only in the great commercial nations like England, is peculiarly his own. It consists in showing that the free transferability of capital, and therefore the perfect competitive action of capital, depends on three conditions, namely: the existence of a vast loan fund, the existence of a vast speculative fund, and the free movement of young men into those channels of business that promise the largest profits.[1] Formerly neither of these conditions existed. Until recently they existed only in financial centres like London, but to-day they exist so generally that their influence begins to be universally felt. In this fact Mr. Bagehot discerned the true cause of the rapid extension of competitive economics beyond the limits of wholesale trade. The laws of the "great commerce" were being irresistibly forced upon the minor commerce. Accordingly he concluded: "As 'men of the world' are the same everywhere, so the great commerce is the same everywhere. Local peculiarities and ancient modifying circumstances fall away in both cases; and it is of this one and uniform commerce which grows daily, and which will grow, according to every probability, more and more, that English political economy aspires to be the explanation."[2] In a word, it was Mr. Bagehot's final conclusion that the mobility of labor and capital is to become practically perfect, and the economic science based on "the principle of competition," though not true at all of the economic world of the past, is to become completely true of the economic world of the future.

Meanwhile Professor J. E. Cairnes, in his attempt to adapt the deductive political economy more perfectly to the present facts of economic society, had discovered limitations of competition not imposed by "local peculiarities or ancient modifying circumstances," but inherent in the nature of men, and there-

[1] Economic Studies, edited by R. H. Hutton, pp. 45–47.
[2] Economic Studies, p. 20.

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fore permanent. Here, then, in the constitution of the "non-competing groups" was an obstacle to the fulfilment of Mr. Bagehot's predictions that could by no possibility disappear. This limitation was not regarded, however, as of the greatest importance. It would have the effect of creating a sort of stratification of prices, but within each stratum the prices of specific services and things would be determined more and more perfectly by competition. Professor Cairnes himself distinctly admitted the importance of the loan and speculative funds as a competitive force.

> It is plain, too [he said], that the capital thus disposable is sufficient for the purpose we have here in view, namely, to render competition effective among the various industries; since we find a portion of it constantly moving abroad for foreign investment — a destination it would scarcely receive while there was a prospect of reaping exceptionally high returns from investment within the country. We have, therefore, in the existence of this fund all that is required for a practically effective competition, so far as *one* instrument of production is concerned, and this without necessitating any serious encroachment on the capital actually engaged in productive operations.[1]

Little more than a decade has passed, and we witness a state of things that, to superficial observation at least, seems totally to contradict these final conclusions at which Ricardian political economy had arrived. Just when the disappearance of the last vestiges of a volitional restriction of competition was looked for, and the universal application of the "rule of the market" was confidently expected, we see a wide-spread revival of economic methods and agencies over which *The Wealth of Nations* was read as a funeral service. And most remarkable of all, it is not only labor, to the absolutely free competition of which natural and permanent limitations were admitted, but capital — that very agent which Mr. Bagehot said "runs as surely and instantly where it is most wanted and where there is most to be made of it, as water runs to find its level," [2] that seems to have voluntarily massed itself into a solidarity, hedged itself about

[1] Leading Principles, Harper's ed., pp. 63, 64.
[2] Lombard Street, p. 13.

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with new and most ingenious restrictions, and bound itself by heavy penalties not to run to any new level or deviate from wonted channels. This increasing prominence of pools and combinations has given a new direction to theoretical thought. A majority of the working economists who have kept up with the progress of events no longer look to see the supremacy of an unhindered competition. By not a few of the ablest investigators the gradual suppression of the competition now existing is predicted. Instead of moving toward freer competition, they affirm, we are moving away from it,[1] and reasons are offered to show that in the very nature of business facts no other result is possible. Not only of such vast organizations of capital as the railroad system is this tendency supposed to be true, but of almost all industries having a large permanent investment.[2] New agencies for adjusting prices it is expected will be necessary. Between a solid body of non-competing employers on one side, and a solid body of non-competing workingmen on the other, will have to stand committees of conciliation and boards of arbitration.[3] The standard of the *justum pretium*, the "reasonable price" of the middle ages, will be again set up and enforced by an appeal, through compulsory publicity, to public opinion.[4]

That combinations are to play an increasingly important part in economic affairs, is altogether probable. But that competition is to be to a corresponding extent destroyed, and that arbitration and publicity are to perform any other function than that of equalizing temporary inequalities of competition, as commercial credit equalizes temporary inequalities of economic pressure, or as insurance equalizes temporary inequalities of loss, are conclusions that should not be too hastily accepted. We should be on our guard against two assumptions. We must not assume that because competition is not observable in the form seen on the produce exchange, it is not discoverable in

[1] Arthur T. Hadley, Railroad Transportation, p. 65.

[2] Hadley, Private Monopolies and Public Rights, *Quarterly Journal of Economics*, October, 1886.

[3] John B. Clark, The Philosophy of Wealth, p. 66.

[4] Report of the Connecticut Bureau of Labor Statistics, 1885, pp. 16, 106.

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any form. We must not assume that when market competition is imperfect it may be ignored, as if it were quite non-existent. These assumptions would be as unwarrantable as the assumption of the *a priori* economists has been in regarding the laws of the wholesale market as so nearly true of economic society everywhere and always that conflicting facts might be dismissed as irrelevant. That competition in some form is a permanent economic process, is an implication of the conservation of energy. Given an aggregate of units of unequal energy, their unequal activity is an inevitable consequence. With the complexity of social environment that every quarter of the earth presents, and the limitless variations of heredity, a society composed of individuals of equal energy is an impossibility. Therefore, when market competition seems to have been suppressed, we should inquire what has become of the forces by which it was generated. We should inquire, further, to what degree market competition actually is suppressed or converted into other forms, and within what limits combinations can hold together and act effectively. The combination equilibrium may be, at best, an unstable one. The economic affairs of every member are in a constant ebb and flow. The relative advantages of members as possible competitors cannot remain long unaltered. And however nearly equal they may be at any moment in economic strength, they will be unequal morally. Not every member of a combination goes into it expecting to break the agreement, but hoping that all other members will keep it ;[1] but this is a true description of the conduct of some. Different producers are always unequal in respect of that larger fidelity that imparts a unique value to a commodity through care in selecting the best materials and the most careful and trustworthy workmen. They are unequal also in those faculties by which production is adapted to changing conditions. The discerning and alert secure the advantages that accrue from the first production of superior substitutes for articles in common use, or the first adoption of more economical methods. Disturbances of equilibrium by any of these means may requicken

[1] J. Schœnhof, The Industrial Situation, p. 74.

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competition within the combination. Competition may be forced upon the combination from without by the accumulation of outside capital seeking employment. The latter is a force that nothing can overcome, though it may be to some extent diverted. It is the organic process of growth, multiplying cells in the vital organism, multiplying individuals in society, multiplying capital in financial centres, — all crowding perpetually upon the existing means of subsistence and profitable occupation, — that insures the permanence of competition throughout the whole range of organic phenomena.

The history of combinations to the present time fully verifies these propositions. Combinations have not prevented the competitive investment of new capital, or sustained prices, or maintained an effective discipline among their own members. The general decline of prices has gone on with little interruption since 1870; that is, during the period within which combinations have had their phenomenal growth. Late calculations [1] give the money cost of the average daily supply of food, dry goods, boots, and fuel, for one adult, as 43.53 cents in 1870, and 30 cents in 1885. The charge for moving a ton of freight per mile over one of the trunk line pool roads is given by the same statistician as 1.853 cents in 1870, and .68 cents in 1885.[2] The industrial depression of 1883–84, which carried nearly all prices to a much lower level than they had reached in the previous depression of 1878–79, did not spare the goods "controlled" by combinations. As compared with the lowest prices at which they were quoted previous to 1882, cut nails were 12 per cent lower in 1884, and steel rails 39 per cent lower.[3] The nail industry affords a good illustration of the inability of combinations to withstand the competitive action of new capital. In 1883 the Western nail association made several attempts to restrict production by suspending work. Notwithstanding this, the number of mills was increased during the year from 68, having an annual capacity of 8,500,000 kegs, to 79, with an

[1] Those of Mr. Edward Atkinson in *Bradstreet's* of December 18, 1886.
[2] The Relative Strength and Weakness of Nations, *The Century*, January, 1887.
[3] *Bradstreet's*, January 10, 1885.

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annual capacity of 12,500,000 kegs, and half of the increase was in the western district.[1] In 1884 a new effort was made to restrict competition; but almost before it took shape the manufacture of nails from steel began, and within a year the steel nail mills that sprang up in the Wheeling district, not to mention others, had a capacity of 2,600,000 kegs per annum.[2] Combinations that might be expected to be strong and efficient, because of their enjoyment of franchises and natural monopolies, are all the while breaking because of internal disagreements. No longer ago than the autumn of 1885 trunk line railroad business was completely disorganized because the roads could not agree on their respective allotments. The anthracite coal combination, formed in 1873, succeeded in controlling the output for three years. Prices were gradually forced to a height that the market would not bear, and stocks accumulated, in spite of the restriction of production, until the combination broke, in August, 1876, and 500,000 tons of coal were sold at auction. Another attempt, made in 1878, was broken by rate-cutting by the Lehigh Valley company and the contention of the Reading company for a larger allotment. A third combination lasted from 1879 to 1884, when its efficiency was destroyed by the commercial depression and the increasing resort to bituminous coal.[3] A fourth arrangement, made in 1885, has been imperfectly successful. Of all the industrial combinations that have been described in alarming terms in the popular reviews and anti-monopoly organs, probably not one-tenth have continuously and effectively limited competition. One of the most perfectly organized and most talked about of these has been the wall-paper combination, and its fortunes have been peculiarly instructive. It was formed in 1880, and made a great deal of money. One party was paid $20,000 a year to cease production. A scale of prices was established, and every member was assigned his proportion of the total production. The penalty for underselling was a forfeit of $1000, one-half to go to the informer. Monthly meetings were held, at which every manufacturer presented a detailed statement of his sales,

[1] *Bradstreet's*, May 10, 1884. [2] *Ibid.*, July 18, 1885. [3] *Ibid.*, January 17, 1885.

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specifying the quality and price of every roll sold, and naming the purchaser. Then the executive committee equalized the proceeds, taking from those that had oversold, and distributing among those that had not sold up to their quota. Yet, notwithstanding these elaborate precautions, competition was not prevented, either within the combination or from without. One member has chosen to pay $10,000 a year in forfeits rather than desist from underselling. By paying factories for keeping idle, the combination has tempted so much new capital into the business that it is now impossible to control production or prices.

The conditions determining the area within which combinations can govern market competition, divert it into new channels, and convert it into new forms, are to be found in certain natural demarcations in the industrial structure of society. This structure, resting on the basis of crude materials, which it transforms, adapts, and consumes, is constituted by the segregation of men into functional groups, corresponding to the subdivisions of industrial operations and the broader differences of personal qualification. A rude attempt to indicate this structure is made in the diagram upon the following page. The subdivision of operations corresponds to the evolution of general utilities into utilities that are more and more highly specialized, and to the division and redivision of materials into successive sub-products,[1] or, more strictly, into successive series of sub-products, as the diagram indicates. Professor Clark has shown that the gradation of sub-products marks off the producers into non-competing groups of an entirely different kind from those described by Professor Cairnes, and that the latter, constituted by such differences of personal acquirement as those that separate artisans from unskilled laborers, have been much broken down by industrial progress. Yet there remains a grouping by differences of personal qualification, which Professor Cairnes failed to state in sufficiently general terms. There is one class of workers fit only for automatic manual labor; namely, common laborers and machine tenders. Above these is a class fit to be

[1] John B. Clark, The Philosophy of Wealth, p. 112.

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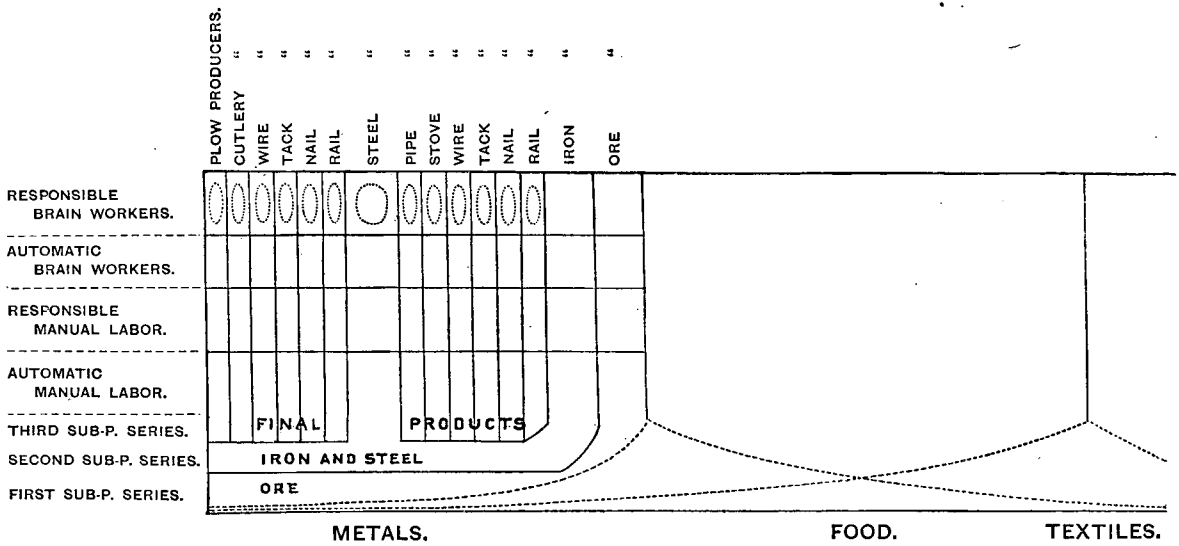

The diagram indicates the division and sub-division of industrial society into groups and sub-groups, by industrial operations and the broader differences of personal qualification. The vertical lines show the division, and, in the group metal producers, the sub-division, into non-competing groups corresponding to industrial operations. The long dotted lines indicate the inter-dependence of the great chief groups, metal, food, and textile producers. The first three horizontal lines, counting from the top, show the division — cutting across the division by industrial operations — into non-competing sub-groups constituted by differences of personal development. The continuation of vertical lines into the lower horizontal lines shows the relation that the producing groups sustain to the gradation of industrial operations into primary, secondary, and tertiary sub-processes. Combinations are represented by the elliptical dotted lines.

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intrusted with some responsibility and liberty of self-direction. It is impossible for those in the first class to compete for places with those in the second, though those in the second may become competitors with those in the first in times of industrial depression. A third class is composed of the automatic brain-workers, such as book-keepers; and a fourth class, of the responsible brain-workers, including the superintendents and directors. The basis of these distinctions, it will be seen, is a much broader one than Professor Cairnes had in mind as the ground of his grouping. It is also broader than the differences of moral quality that the adjective responsible, used for the lack of a more exact word, suggests. It is that broadest psychological gradation, which Mr. Herbert Spencer has described as consisting of differences of mental mass and complexity.[1] These divisions cut transversely across those described by Professor Clark, and constitute sub-groups within his groups. It is, further, within the non-competing groups so constituted that combinations are formed; and, for reasons fully set forth by Professor Clark, any one combination is usually confined within the limits of a single group. This introduces a new complication, for the combination is a radically distinct aggregate from the non-competing group within which it exists. While the non-competing group consists of those that are supposed not to compete with the members of any other group, but to compete freely with each other, the combination consists of those that are supposed not to compete at all with each other, but to compete freely with those outside of its limits. The employer groups and combinations are further complicated by the centralization there of capital.

It is plain that these demarcations describe groups that are very unlike in composition and very unequal in economic condition. Heterogeneity of composition increases as we go backward in the scale of sub-products toward crude materials, because the dimensions of the group enlarge, both geographically and in respect of numbers. The group producing a final sub-product is necessarily limited in size, not only because it repre-

[1] See the article on The Comparative Psychology of Man, *Mind*, January, 1876.

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sents a minute sub-division of a more general product, but because the quantity of a highly specialized product that society can consume is itself limited quite narrowly. The market is easily oversupplied and demands but a relatively small number of producers. It follows that the possibilities of combination are slight in the large and loose groups that produce the primary sub-products, unless their operations are protected by natural, or legal, especially patent-right, monopolies. In the small and compact groups producing final and highly specialized sub-products, the possibilities of effective combination are much greater. Anthracite coal mining is a primary process, but it yields to combination because it is a natural monopoly and easily forms illicit alliances with the railroads. Steel making is a secondary process, amenable to combination because protected by patents; but in iron making, also a secondary process, combination is maintained very imperfectly and with great difficulty. Besides being at this disadvantage in the matter of combination, the primary and secondary sub-product groups are subjected to the further strain that disturbances of the economic equilibrium, anywhere in the industrial structure, distribute themselves backward toward the primary groups. Within each group the distribution is downward, through the sub-groups toward the lowest — the automatic laborers. A strike that stops the production of a sub-product may cause the suspension of operations and the bankruptcy of producers in the sub-product group beyond it, by cutting off supplies; but the liabilities of the advanced group will be due chiefly to the preceding groups, and the bankrupted employers and discharged workmen will force their way downward as competitors for employment; some of the bankrupted employers obtaining places as clerks, and some of the clerks and foremen taking work as machine tenders and laborers. Furthermore, as Professor Clark has shown,[1] the primary and secondary groups dispose of their products to society and receive their recompense only through the tertiary, and are therefore much at the mercy of any conditions that the latter may impose.

[1] Philosophy of Wealth, p. 114.

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One important conclusion is now in sight. When a product is supplied to society in the full measure of the social needs, the supply of correlative needs being taken into consideration, the further investment of capital and labor in producing that product should cease. That combinations in the final sub-product series may often restrict competition to this extent is evident from the fact that they often attempt to do more. What, then, becomes of the competitive forces — where do accumulating capital and labor find employment? We are confronted here with our primary question, and the answer to it that now appears is one full of meaning for progressive societies. Diversion backward into the primary or secondary sub-product groups would be the natural course for labor and capital to take when barred out from the final groups, but for the facts just noted; *viz.*, that the primary and secondary groups are dependent on the tertiary for their market, and are obliged ultimately to bear a large proportion of the losses of the entire industrial system. In progressive societies, rich in inventive talent, channels of less resistance will be opened by the invention or discovery of new utilities. These may be satisfactions of wants that were never met before, or they may be superior substitutes for the products that the new capital was deterred from producing. The possibilities in the latter direction are shown by the present production from steel of such articles as rails, nails, tacks, and wire, that formerly were made only from iron. The production of Bessemer steel ingots during the first six months of 1885 was 40,000 tons in excess of the production during the second six months of 1884. The production of steel rails was 70,000 tons less. The difference had gone into other manufactures for which puddled iron was formerly used.[1] In societies that have learned to value quality above quantity of possessions, other channels will be found in the almost limitless possibilities of bettering the quality of commodities. New utilities afford opportunities for capital accumulating outside of the combinations; the improvement of quality gives vent to competitive energies within the

[1] *Bradstreet's*, August 1, 1885.

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combinations. How this may be, is well illustrated by a certain brass goods combination that has maintained uniform prices but made no attempt to pool production. The result has been precisely that higher form of competition that John Ruskin advocated in *Unto This Last* as the only one that Christian communities should tolerate. The members of the combination have rivalled each other in offering the most perfect goods for the price, and their products have attained a degree of excellence that is unique in American mechanism.

But that competition shall be thus diverted into new and higher forms, it is not necessary that combinations shall keep production below the full supply of the social needs, or maintain prices above the level that yields average returns to the labor and capital employed. Taking one series of years with another, neither of these things can be done. While the area within which combinations are possible is determined by the industrial structure, the degree to which they can control competition within that area is limited by the strength of the competitive forces. These, as we have seen, are two: the pressure of accumulating capital upon the opportunities of employment, and the necessities of the producers already in the field. During an industrial depression the active competition of new capital is at a minimum, but the established producers find increasing difficulty in meeting their liabilities. Self-defence becomes the ruling motive. Conversely, when demand is increasing and prices are rising, the pressure of new capital becomes intense; but, the struggle to meet liabilities having given place to an easy accumulation of gains, the motive for resisting the competition of new capital is weak. Combinations are therefore, in their historic origin and in practical limitations, defensive organizations, for mutual protection against a competition that has become, or that threatens to become, predatory and ruinous. It was during the industrial depression of 1883, when production was far in excess of the demand, that the cut nail combination, already referred to, tried to restore the balance by suspending operations. It was when the prices of their product had declined nearly 13 to 15 per cent within

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six months, that the writing paper manufacturers effected a combination that limited production temporarily, but that had the ultimate effect, as one of its members assured the writer, of "building new mills." When the Bessemer steel rail combination made its compact at Long Branch in August, 1885, to limit its output by the demand for consumption, the capacity of the works represented was greatly in excess of the demand, and price-cutting within the combination had been going on for some time. The market improved, and, at the end of a year and a half, the Bulletin of the iron and steel association announced that 1,500,000 gross tons of steel rails were made in 1886, against 950,471 in 1885. And this improvement of the market, enjoyed by other branches of the iron and steel industry also, instead of tempting the combinations to extort the highest possible prices, created a strong feeling on the part of manufacturers that if prices were permitted to go higher, it would so largely increase production as to bring about a reaction.[1] These are but examples at random from many that might be cited. If statistics of the extent and efficiency of combinations could be obtained, the curve undoubtedly would rise and fall with the curve of industrial depressions.

The degree to which combinations can restrict competition is further limited in more specific ways. As defensive organizations they cannot sustain their weakest members indefinitely. All business is in a sense a combination. Commercial credit and personal accommodation enable all parties in the great struggle for existence fairly to try their powers. By such assistance temporary difficulties are overcome. Combinations perform a like service in a negative way by restraining conduct that is mutually injurious. But just as recurring waves of bankruptcy from time to time sweep off the competitors that are essentially weak, notwithstanding the help that they may have alternately received and extended, so an industrial depression of unusual severity or duration forces one or another party to unload his stocks at any prices that he can get, regardless of combination agreements, and consummates the extinction of

[1] *Bradstreet's*, December 25, 1886.

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those producers whose disadvantageous situation or antiquated methods make their cost of production relatively high. On the other hand, any attempt of the combination to become an aggressive agency for the positive enrichment of its members is subject to the limitation, that the conditions that might enable a combination to force prices to an unnatural level are the very ones that insure the most disastrous reaction upon such a policy. Other things being equal, new capital will hesitate longest about entering into competition with established producers in those industries in which each producer must have a plant that is costly in proportion to the value of the total product of all producers. But the combination that would reap advantage from this hesitancy must face the fact that it is precisely this expensiveness of plant that entails heavy fixed charges, — which must be met at whatever sacrifice of profits, — and impels competition to a ruinous extreme if more capital is tempted into the business than the normal social need requires. A short-sighted and grasping policy by railroad companies and industrial combinations that might, by a liberal course, have kept entire markets to themselves, has resulted in the building of scores of railroads and hundreds of mills for which no real need existed, and the struggles of these for subsistence has kept rates and prices below the dividend-paying level for years together.

Hence, as combinations learn their unalterable limitations in "the nature of things," they must adjust prices and production, by a conscious policy, to the normal basis that otherwise will be reached in a more wasteful way. They must permit the full satisfaction of normal demands and allow prices to gravitate to an equality with cost of production. If there is really room for new plant, and new capital seeks investment in new plant, the combination by standing in the way will only encourage investment in excess. If a member of the combination, or a new competitor, is able through the adoption of new machinery or better methods, or by any other advantage that he enjoys, to make his goods at a lower cost than has been possible before, and therefore to put them on the market at a lower price in the

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hope of increasing his sales, the combination must let him make the price and leave other members to conform to it by adopting his methods. Failing to do this, it will but intensify the inevitable struggle for survival when it comes. It does not invalidate all this that pools sometimes pay would-be competitors for ceasing production, and that members of combinations can sometimes afford to pay forfeits for price-cutting. These are but means of testing the probable permanence of the existing relations of demand and supply. If the undersupply of the market that tempts new capital is but temporary, the price paid to prevent it from entering the field is the cost of warding off a loss otherwise certain. If the undersupply continues, the attempt to buy off competition will only stimulate it. If forfeits were graduated according to the degree of price-cutting and the volume of sales, and were made recoverable by the party paying them if he demonstrated his ability to maintain his terms permanently, they might afford a nearly perfect test of the price the combination must prepare to accept, and a nearly perfect check against underselling for predatory purposes. Expenditures in these ways, within the limits dictated by prudence and the lessons of experience, are elements in the cost of production under modern conditions as legitimate as insurance premiums, and it is not impossible that combination actuaries will yet reduce the principles governing combination forfeits to something like scientific form.

If our conclusions so far are sound, can the affirmation be maintained that market competition has been really suppressed, or that the essential principles of Ricardian economics have been overthrown? Ricardianism never contemplated competition in the production of additional goods for a market already overstocked, or chronic competition in selling goods below the cost of production. It assumed that when competition had forced the price of any commodity down to the sum that barely recompensed labor and risk, production and underbidding would cease and labor and capital would find other employment. When Ricardo wrote, this assumption was warranted by commercial facts. It is only when production is carried on by processes

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involving heavy fixed charges that producers are impelled to continue operations without regard to the state of the market. It is only when large reserves of capital can be drawn on that it is possible to sell below cost, on a great scale, for the sake of winning a strategic advantage. In Ricardo's time these conditions did not exist in any trade or manufacture. If, then, combinations deal effectively only with competition below the solvency line, are not the essential Ricardian principles as true to-day as they ever were, and are not Mr. Bagehot's predictions verified? The competition that wastes resources and ruins competitors is an abnormal process that in a sound industrial system will necessarily create reactions against itself. Such competition will probably encounter an increasingly perfect resistance. The competition that forces production to supply fully the social demand, and forces prices down to an equivalence with the cost of production, is normal. Limitation of the range through which the series of competitive acts may extend but increases the amount of normal competition, since by preventing the wasting of capital it increases one of the chief competitive forces.

FRANKLIN H. GIDDINGS.

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THE GREENBACK IN WAR.

THE valuable paper by Professor Henry C. Adams in the September number of the POLITICAL SCIENCE QUARTERLY, on the relative merits of taxes and interest-bearing loans as financial resources in war, suggests a consideration of a third and an extremely plausible and pernicious measure of war finance, the levying of a forced loan under the guise of an issue of government paper, — most plausible and pernicious when it has the quality of legal tender affixed to it. We may disregard the notions of the extreme "greenbackers," although they have not yet ceased to wield some influence in politics; but there remain some facts that we cannot afford to disregard. A large proportion of the people of the United States believe that the issue of paper money in the civil war was a necessity, and that its legal tender quality did help it to circulate and to meet the demands of the government. The Supreme Court of the United States has affirmed the constitutionality of the "greenback" in peace as well as in war, and it has declared Congress to be the sole judge of the necessity that warrants the issue of legal tender notes. The extreme ease of obtaining money by printing it, without directly taxing the present generation or seeming to leave to the next a debt to be paid by taxes, will always make it the first device thought of by a finance minister when a large quantity of money has to be raised at once.

The value of the legal tender quality in a government issue can be very readily disposed of. Money is used to pay debts and to make purchases. Current accounts need not be considered, for they are usually settled every thirty or sixty days, and the fluctuations of the currency while they are running are comparatively small. The legal tender notes were available by law for the settlement of debts. This did the government no good. The government did not need money to pay debts with;

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it wanted money to make purchases with. The legal tender notes enabled debtors to settle for less than they borrowed, but the government had no interest in this; and the use of money in paying time loans is so small compared with its use in making current purchases, that the legal tender quality of the notes could not add appreciably to their general utility. In the making of purchases, whether by the government or by an individual, the legal tender quality availed nothing, for the seller of the goods wanted the currency to make other purchases with; buyer and seller simply bartered so many government notes for so much flour. But here we come to a question which is much debated, even among persons whose ideas on finance are in general what are called sound. Prices rose during the war; the greenbacks were depreciated; but was not the advance in prices due mainly to the destruction of material by the war and the enormous purchases by the government? At the same moment that the government confessed bankruptcy by making its notes a legal tender, it depreciated its notes by refusing to receive them at custom houses; did not this create a special demand for gold that enhanced its price?

I have made an effort to answer this question by a comparison of prices as given in the Treasury reports, month by month, with the gold premium during the war. The following is the method employed for ascertaining the course of prices, or the variation of the legal tender note's purchasing power. The following twelve staple articles were selected for study: wheat flour, corn meal, anthracite coal, copper sheathing, American window glass, Buenos Ayres hides, common English bar iron, pig lead, hemlock leather, mess pork, mess beef, and common wool. Such a quantity of each of those articles was taken as cost, January 1, 1860, $8.333. The whole list, then, on the date given, cost $100. For each month following the same quantity of each article was taken and multiplied by the price then quoted, and the twelve results added. At the date given, 1.581 barrels of flour, 4 hundredweight of bar iron, 21.36 pounds of wool, and so on, were taken. This method, it would seem, ought to give a correct idea of the variations of prices, or the

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depreciation of the legal tender note, not in gold, but in commodities. The following table gives the fluctuations of prices obtained in this manner, month by month, and the monthly premium on gold, for purposes of comparison. But the prices are taken on the first of each month, while the gold premiums are monthly averages. The table is designed to show the relation of prices on the first of any month with the premium on gold for the average of the preceding month.

	Gold.	Prices.
Jan., 1862		
Average	$102.50	
Feb. 1		$103.05
Average	103.50	
March 1		102.13
Average	101.80	
April 1		102.90
Average	101.50	
May 1		102.17
Average	103.50	
June 1		103.84
Average	106.50	
July 1		104.80
Average	115.50	
Aug. 1		111.86
Average	114.50	
Sept. 1		114.27
Average	118.50	
Oct. 1		115.93
Average	128.50	
Nov. 1		128.90
Average	131.10	
Dec. 1		132.82
Average	132.30	
Jan. 1, 1863		132.25
Average	145.10	
Feb. 1		143.67
Average	160.50	
March 1		147.11
Average	154.50	
April 1		141.07
Average	151.50	
May 1, 1863		$134.10
Average	$148.90	
June 1		135.06
Average	144.50	
July 1		137.77
Average	130.60	
Aug. 1		131.03
Average	125.80	
Sept. 1		131.45
Average	134.20	
Oct. 1		139.30
Average	147.70	
Nov. 1		146.07
Average	148.00	
Dec. 1		151.72
Average	151.10	
Jan. 1, 1864		153.00
Average	155.50	
Feb. 1		162.50
Average	158.60	
March 1		162.47
Average	162.90	
April 1		168.16
Average	172.70	
May 1		176.77
Average	176.30	
June 1		190.32
Average	210.70	
July 1		230.94
Average	258.10	
Aug. 1		246.90
Average	254.10	

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	Gold.	Prices.
Sept. 1, 1864		$254.18
Average	$222.50	
Oct. 1		239.40
Average	207.20	
Nov. 1		232.76
Average	233.50	
Dec. 1		230.30
Average	227.50	
Jan. 1, 1865		248.88
Average	216.20	
Feb. 1		242.19
Average	205.50	
March 1		247.02
Average	173.80	
April 1		207.36
Average	148.50	
May 1		199.11
Average	135.60	
June 1		170.52
Average	140.10	
July 1		162.70
Average	142.10	
Aug. 1		169.16
Average	143.50	
Sept. 1		168.83
Average	143.90	
Oct. 1		189.33
Average	145.50	
Nov. 1, 1865		$191.13
Average	$147.00	
Dec. 1		190.21
Average	146.20	
Jan. 1, 1866		186.28
Average	140.10	
Feb. 1		188.34
Average	138.40	
March 1		183.86
Average	130.50	
April 1		171.14
Average	127.30	
May 1		173.00
Average	131.80	
June 1		175.24
Average	148.70	
July 1		179.29
Average	151.60	
Aug. 1		177.95
Average	148.70	
Sept. 1		177.02
Average	145.50	
Oct. 1		180.37
Average	148.30	
Nov. 1		181.61
Average	143.80	
Dec. 1		166.84
Average	136.70	

What these figures show in detail, the following diagram shows more graphically. The dotted line which runs from point to point shows the variations of prices as taken on the first day of each month for the years indicated on the margin. The line consisting of horizontals and perpendiculars represents the premium on gold averaged month by month. The lowest line obliquing from point to point represents the quotation of the 6's of 1881, taking the mean quotation for each month. The base or par line, indicated by the figures 100, represents, for this diagram, the legal tender notes, in terms of which the prices of bonds, merchandise, and gold are expressed. The

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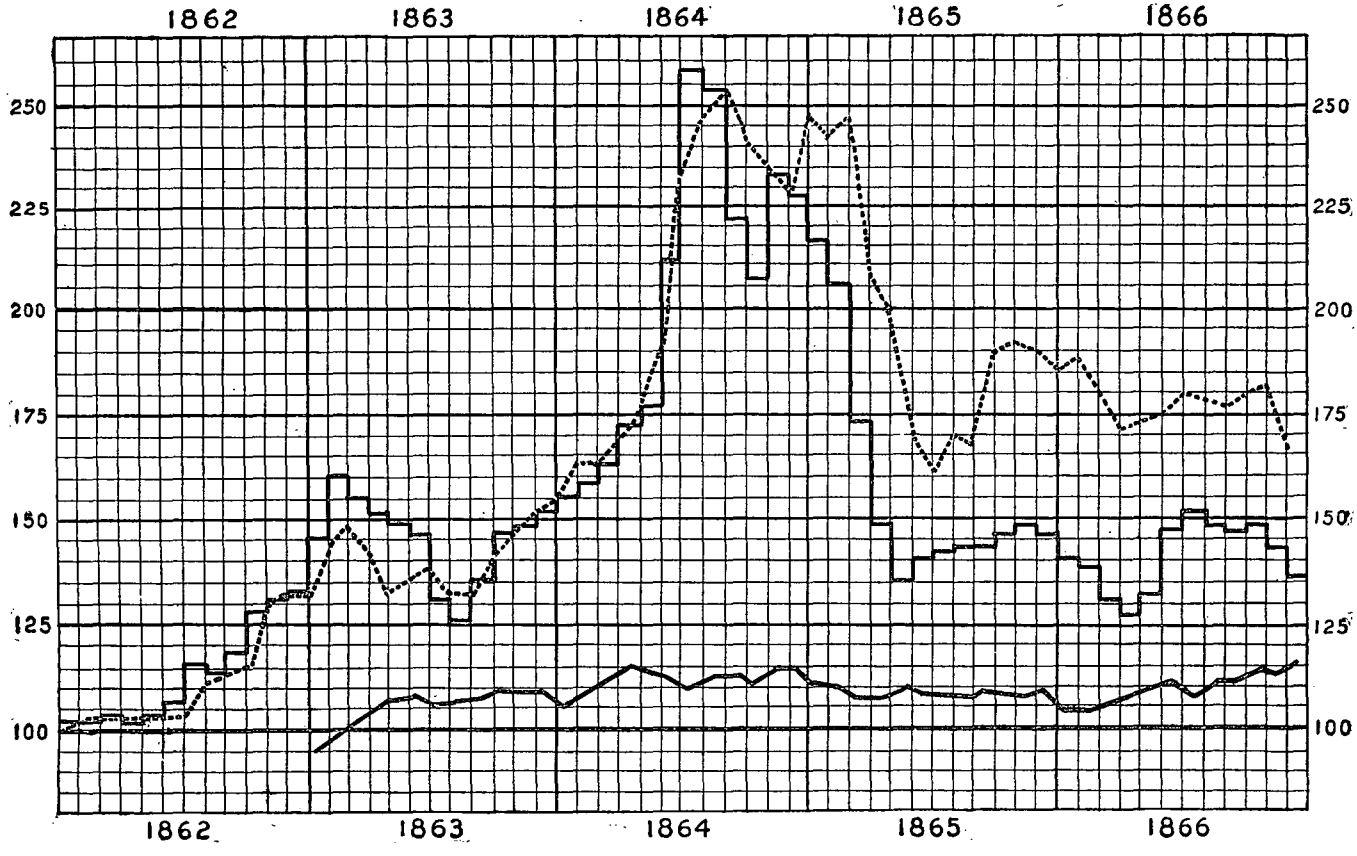

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facts shown in this diagram may be shown in diagrams taking gold for the base line, and showing the fluctuations of commodities and greenbacks compared with gold, or taking prices for a base line and showing the variations from that line of the lines representing gold and greenbacks. The commodities that cost $100 on January 1, 1860, rose during the year not more than 84 cents, and fell not more than $2.21. In January, 1861, the list stood at $96.24; in June, $94.79; in July, $87.66; in August, $86.32; in September, $87.59; and in December, $97.15.

The first effect of the war, then, was not to raise prices. It may be presumed that the state of alarm and uncertainty incited men to sell rapidly and turn their merchandise into money. This was favorable to the government. The coincidences in the table above are striking enough to amount to something very near a mathematical demonstration. Between January, 1862, and November, 1864, the premium on gold and the premium on merchandise agree within less than a dollar in nine months, within one to five dollars in eleven months, within five to ten dollars in five months, and within ten to twenty dollars in eight months. In the latter part of 1864 there was a decided advance in prices. This is easily accounted for by the destruction of material that had occurred, and the effect of what Professor Adams calls the labor tax — the withdrawal of men from industries to recruit the army. But the general advance of prices having occurred, the depreciation of legal tender notes in gold and their depreciation in commodities vary sympathetically much as before. From November, 1864, to December, 1866, are twenty-five months. In one, the first of the series, before the rise of prices had been completed, the two premiums are within three or four dollars of each other. The difference is between twenty and twenty-five dollars in three months, between twenty-five and thirty dollars in five months, between thirty and forty dollars in four months, and between forty and fifty dollars in twelve months.

The corresponding movements of the two premiums can be seen at once on a diagram, but they can be followed as well in

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a table of figures. The table shows complete comparisons between the gold premium, average, for one month, and the merchandise premium for the first day of the following month in fifty-eight cases. In thirty-nine of these cases an advance in the premium on gold is immediately followed by an advance in the premium on merchandise, and conversely in the case of a fall; of the thirty-nine instances, twenty-five are rises and fourteen are falls. In ten of the remaining nineteen instances the premium on merchandise follows the movement of the premium on gold after an interval of a month; a rise in gold from July to August is followed by a rise in prices on the first of October instead of the first of September. Of the nine remaining cases some of the rises of prices when gold fell, or falls of prices when gold rose, are very small fluctuations, and some occurred late in the summer of 1864 when the general range of prices was advancing as measured in gold.

Secretary Fessenden was so carried away with the prevalent delusion about the nature of gold premiums that he remarked in his annual report:

> It is quite apparent that the solution of this problem [the violent fluctuations of gold in 1864] may be found in the unpatriotic and criminal efforts of speculators, and probably of secret enemies, to raise the price of coin, regardless of the injury inflicted upon the credit of the country, or desiring to inflict. All such attempts should be indignantly frowned upon by a patriotic community, and efforts of all good citizens invoked to counteract such nefarious schemes. A law providing for the exemplary punishment of combinations for such a purpose might tend to vindicate, if it could not fully protect, the public rights in this regard; and it should be, so far as possible, rigidly enforced.

It is a sufficient reply to this to point out that, while the highest point reached by gold was 285, bar iron went up on the same scale to 500.

No government has succeeded in fixing prices; and until that can be done, the legal tender quality of government paper is impotent for all purposes, except to enable debtors to cheat their creditors — an operation of no sort of value to the government and a distinct injury to the community. It is not im-

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probable that the war might have been carried through on a gold basis without the issue of government notes. Without the greenbacks we could have borrowed money in London; there were times when that would have been convenient to us. If we had had English money, we should have had English sympathy, and there would have been no Alabamas. It is the belief of many that the attitude of England prolonged the war. Her attitude would have been different if we had eschewed legal tenders and borrowed money in Lombard Street.

There was a pretty good stock of gold in this country at the outbreak of the war. The government could have borrowed every dollar of it if it had not driven it out of the country. In the fiscal year 1861, more gold came into this country than went out of it by $16,548,531. According to Treasury estimates, we had $90,000,000 more of coin in the country in 1861 than in 1860. The superintendent of the mint estimated that there was between $275,000,000 and $300,000,000 of coin in the country in 1861, all but $20,000,000 of which was in the loyal states. Although there was an enormous increase in government disbursements, it does not follow that anything like a proportionate increase in the volume of the currency was necessary; for one thousand dollars will pay for a million dollars worth of merchandise if it circulate fast enough. In the latter part of the summer and in the fall of 1861, the associated banks of New York, Philadelphia, and Boston loaned the government $5,000,000 every six days; and these advances could not only have been kept up indefinitely, — for Mr. George S. Coe says that the money flowed back into the banks in a week from the time it was advanced to the government, — but it could have been greatly increased by bringing the banks of other cities into the association, and promptly supplying the banks in return with something they could sell to the people. The banks of the three cities advanced $150,000,000 to the government before they received any negotiable securities from the government. From August to December 7, 1861, the banks of New York advanced $105,000,000, and their gold reserves were depleted only $7,000,000, in spite of this great delay in the delivery of

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the 7-30 notes. But in December Secretary Chase began paying out the "old demand" notes. Of course they, instead of gold, flowed into the banks. This was the beginning of the end. In three weeks after December 7 the New York banks lost $13,000,000 of gold, and then they suspended specie payments. Then the era of fiat money set in. There was a deliberate purpose to depreciate the currency in 1862, in order to make bonds sell at apparent par. Congressmen declared that it was not becoming the dignity of a great nation to peddle its bonds in Wall Street for what they would bring in gold. Representative E. G. Spaulding said in the House, in opposition to putting bonds on the market without previously diluting the currency:

> Depreciation would greatly increase the debt by requiring a much larger amount of bonds to be issued than would be needed if your loans were taken at par.... I fear the 20-year 6 per cent bonds would under the pressure fall to 75, 70, 60, and even 50 cents. This would be a ruinous mode of raising the means to carry on the war.

But if Mr. Spaulding did not believe that the government's promises to pay would be taken at par when they carried with them 6 per cent interest in gold, why did he suppose that promises to pay at no fixed time and carrying no interest would circulate at par? Simply because he was a victim of the legal tender, or fiat money, delusion. The very 6 per cent bonds that Mr. Spaulding was talking about were issued at less than 65, measured in gold; and in July, 1864, they had fallen to 40. In that year depreciation was repeated in order to make 5 per cent 10-40 bonds sell at apparent par.

To the government this involved enormous loss. It cannot be calculated, but some facts will suggest its immensity. The government issued, of the 5-20's of 1862, $514,771,600, which, reduced to gold by the average annual premiums in the years of issue, yielded $293,323,711. Here is a shrinkage of no less than $221,447,889. The entire amount of this loan was redeemed at or very close to par in gold. The government borrowed in real value $293,323,711; it paid 6 per cent on the

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nominal amount borrowed, or over 10 per cent on the actual amount borrowed; then it paid back in real value 75 per cent more than it borrowed; and this bonus was paid in an average period of eleven years from the time of borrowing, nearly 7 per cent a year, making in all about 17 per cent per annum that the government paid on what purported to be a 6 per cent bond. Reducing the issues and redemptions of the consols of 1867 to gold in the same way, we find that the government borrowed $277,494,660, and paid, to 1880, besides 6 per cent interest on the face (not the selling) value of the bonds, $377,287,850. The government paid 8 per cent on the amount really borrowed, and after ten years paid a bonus of 36 per cent, equal to 3.6 per cent a year, making over 11 per cent that the government paid for money when the war was over, the nation's solvency established, and the country prosperous. That this was due to the injury inflicted on the government's credit by the legal tenders is obvious from the fact that, though the bonds drew interest in gold, and were presumably, when not so specified, to be paid in coin, their prices kept comparatively close to the legal tenders, instead of rising with gold. In 1863, 1864, and 1865, the 6's of 1881 never rose above 115½ in legal tenders, and were usually below 110. The 10-40's in 1864, 1865, and 1866 ranged from 89¼ to 103½ in currency.

If the legal tender act was ruinous to the national Treasury, it was robbery to individuals. Anything like the extent of this robbery it is impossible to show, but some figures are suggestive. In 1862 the deposits in savings banks in New England and New York were reported at $168,527,817. This is substantially the gold value of the deposits, as the statements were made before depreciation had begun, or had gone far. The savings bank reports warrant the assumption that this amount of money was drawn out in two years. If we reduce half the amount to a gold value in 1863, and half to a gold value in 1864, the loss to depositors by depositing gold or redeemable notes and drawing out legal tender notes was over $26,000,000 in 1863, and nearly $43,000,000 in 1864, or about $69,000,000 in all. The legal tenders were what these banks had to accept

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from the people who had borrowed money of them, so that this $69,000,000 is money that by act of Congress, and without any benefit to the government, directly or indirectly, was taken from the small capitalists who deposited their savings in the banks, and given to the larger capitalists who borrowed money of the banks.

For the year ending November 1, 1863, twenty-five life insurance companies paid death policies amounting to $2,369,139. During this period the average premium on gold was 42.2. The depreciation on these death payments, or the extent to which an act of Congress robbed the widow and the fatherless for no public purpose, was $703,078. In the year ending November 1, 1864, twenty-five companies paid death losses amounting to $3,281,470. For the twelve months gold stood at about 190. The depreciation on these losses was $1,554,470; or, for two years, $2,257,548.

The variations of prices, gold premiums, and bond quotations during the period of the war, justify the following conclusions:

I. The general impression that war sends prices up is a mistake. In 1861, 1862, nearly all of 1863, and half of 1864, prices were lower, measured in gold, than they were in 1860. It was not till within nine months of the surrender at Appomattox that a general and lasting advance in prices measured in gold occurred.

II. The premium on gold was substantially the measure of the decreased purchasing power of government notes, and not a merely speculative price put on gold. This is shown by the fact that while the variations of prices as compared with legal tender notes were extremely irregular, and bore no perceptible relation to the latter, prices and gold premiums rose and fell in close accord with each other for five years; and, what is more, the changes in gold premiums closely preceded like changes in prices.

III. The issue of government paper forced the banks to suspend specie payments. The amount of coin in the country, and the rapidity with which it was advanced to the government by the banks of only three cities, render it probable that any

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large issue of government paper might have been avoided, and the war carried through on a gold basis. While the amount of government paper out was small there was little or no premium on gold or advance in nominal prices, although specie payments had been suspended.

IV. But the government paper being issued, it follows from No. II that the legal tender quality given it added in no appreciable degree to its value. The notes bought more or less of flour or cloth from time to time, according to the prospect at that time that the government would ultimately redeem its promise to pay dollars with dollars.

V. The legal tender device enabled private debtors to wrong their creditors, but it did not enable the government to sell its bonds at par in the gold with which it promised to redeem them or in the commodities which it had to buy. The legal tender act was so violent and injurious a measure that it hurt the credit of the government. This is shown by the fact that gold bonds kept close to par in greenbacks instead of par in gold.

VI. The expulsion of gold and the transaction of business on the basis of a depreciated and fluctuating currency cost the government an amount several times greater than the volume of legal tender notes outstanding at any one time. The government sold its bonds at par in notes that were depreciated partly by its own act in refusing to accept them at custom houses; with this money it bought merchandise that had advanced greatly as expressed in government notes, though for much of the period actually reduced in gold; and finally it paid off the bonds at a premium, or with notes that were worth par in gold, or close to it; so that the legal tender act vastly increased the amount of bonds that had to be sold and the actual compensation the government paid to its creditors for their advances.

FRED. PERRY POWERS.

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OUR LEGAL CHAOS.

I.

IT is proposed in this article to refer to the present condition of our jurisprudence, to point out some of its defects, and to suggest the needed remedy.

It would be a mistake to suppose that such a discussion is fitted only for lawyers. It ought to interest every liberally educated man. Properly presented, it could not fail to interest all students of political science. Its discussion need not be essentially technical, although it may be true that the merits of the observations and suggestions which may be made can perhaps best be judged of by lawyers. Even this, however, is not entirely clear. The body of the legal profession practise the law as a calling, and their time is mainly engrossed by labors to determine what the law actually is, rather than by studies and reflections as to what it ought to be. The world is indebted for some of its best inventions and ideas to "cranks." Our jurisprudence is indebted for much of its improved condition to *doctrinaires*, who are often a species of legal cranks.

I certainly would not speak of Mr. Bentham with disrespect, but in the elements which made him a legal reformer the philosopher and the crank largely enter and curiously intermingle. The reader may have chanced to meet with Mr. John Neal's *Biographical Notice* of Mr. Bentham, published about fifty years ago. Mr. Neal was a devoted young American Benthamite, who became acquainted with Mr. Bentham in 1825, when the latter was over seventy-five years of age. Mr. Neal states that he was with Mr. Bentham

> every day for about eighteen months, and spent every evening with him, from six o'clock, the dinner hour, till about eleven or twelve at night; though others may have known him longer, they did not know him more intimately.

He draws this striking, almost grotesque, picture of him :

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Calls me every day to walk in the garden with him before dinner. Halloos like a man-of-war's boatswain in a storm; good practice for the lungs; thinks they are strengthened by it, as they undoubtedly are. When he began to halloo, he could not make himself heard in the library; now the whole neighborhood may hear him. I observe to-day that his real stature, before he began to stoop, must have been about five feet six.

I do not know that I ever saw a finer picture than this old man, hurrying away on a respectful trot, with a cane that he calls "Dapple," after the favorite mule of Sancho Panza; a plain, single-breasted coat of a dark greenish olive; white hair, as white and plentiful and curved about as much as the mane of a horse; a straw hat, edged and banded with a bright green ribbon; thick woollen stockings, rolled up over his knees outside of a pair of drab cloth trousers, — he hates breeches; — never could look at himself in breeches without laughing, he says; — a waistcoat of thin striped calico, all open at the bosom; — a dress, take it altogether, which he wears, not only in the depth of winter, but in the heat of summer. . . . The philosopher sleeps in a bag, and sometimes with his coat on, the bed not being made up for a month together.

Mr. Bentham never practised law. It is a misfortune, perhaps, to the world that he did not. "On a particular occasion," he said, "I gave a legal opinion, which turned out not to be law; after this I refused to give an opinion." Yet to Bentham and the influence of his writings much of the improved condition of the law of to-day, as compared with the law of fifty years ago, is undeniably due. He attacked the existing system with merciless severity. "He compelled every portion of it," says Professor Amos, "to justify itself by something better than its antiquity."[1] Mr. Justice Stephen puts the matter thus:

Coke and Blackstone fell into the error of asserting the excellence of the substance of the law in an exaggerated strain, whilst they showed much insensibility to defects, both of substance and form, which in their time were grievous and glaring. Bentham seems to me in many points to have fallen into the converse error. He was too keen and bitter a critic to recognize the substantial merits of the system he attacked; and it is obvious that he had not that mastery of the law itself which is unattainable by any mere theoretical study, even if the student is, as Bentham was, a man of talent, approaching closely to genius. During the last twenty-five years Bentham's influence has to some extent de-

[1] Amos, Science of Law, ch. i.

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clined, partly because some of his books are like exploded shells, buried under the ruins they have made.[1]

Macaulay, in 1832, predicted the judgment of the future concerning Bentham in these words:

> Posterity will pronounce its calm and impartial decision; and that decision will, we firmly believe, be that Mr. Bentham found jurisprudence a gibberish and left it a science.[2]

This eulogium is unquestionably overcharged. With so complex and vast a science as modern English jurisprudence, it is given to no one man to effect so wonderful a transformation as is here imputed. It was not a gibberish when Mr. Bentham dealt with it. It was, indeed, much amended during his life; but in its substantive character he neither wrought nor witnessed radical changes. Still, it may truly be affirmed that he set a ball in motion which is moving still.

This somewhat extended reference to Mr. Bentham is justified as an illustration of the fact that needed reforms in the law are not generally originated or chiefly promoted by practicing lawyers or judges, and by the further fact that, in some considerable degree, the suggestions of this paper are based upon his writings or the influences which they set in motion. The conservatism, often obstinate, and the inertia, often immovable, of the bar, in every country, are truths shown in every stage of its history.

The relation of law to political science is so obvious as not to require enforcement. Mr. Pollock, in one of his instructive and valuable essays, thus tersely states this relation:

> We may say with truth and fitness that law is to political institutions as the bones to the body. It is the framework from which [political] institutions take their form.[3]

No apology, therefore, is needed for the discussion of the present subject in this periodical; but the admissible limits of a single paper preclude much elaboration or detail. Indeed, we aim at nothing more than to set the reader to examining

[1] Stephen's Digest of the Law of Evidence, Introduction.

[2] Macaulay, Essay on Mirabeau.

[3] Essays in Jurisprudence, No. VIII, The History of English Law as a Branch of Politics.

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and thinking for himself concerning a subject which is sure to occupy more and more of public and professional attention.

II.

The first thing that arrests the attention of the inquirer into the condition of our jurisprudence is its bulk or voluminousness.

Our law is composed of two main constituents: First, statute law (including, in this country, constitutional law); and, second, judiciary or case law, that is, the law made by the judges in the accustomed and direct exercise of their judicial functions.

It was long a favorite fiction that the judges did not *make*, but only *declared*, the law. But it is no longer anywhere denied, nor can it be, that the judges, not only in the process of the interpretation of statutes, especially where they extend them to cases without their letter but within their supposed reason or equity or general utility, but also in cases which, where the statutes are silent, they decide by rules deduced from previous decisions or by reference to the principles of natural right or universal justice, are actually, though indirectly, engaged in *legislating*, since they frame the rules which they apply to the transactions in hand, and which constitute the basis of the judgments they pronounce.[1]

Statute law is, of course, the direct work of the legislative body, embodied in the form of an enactment. The usual course of legislation, whatever may be its subject matter, is irregular and intermittent. The legislature, ordinarily, does not attempt a systematic enactment or complete revision of the law on a given subject. It presupposes that the common law is certain and known. Some change is deemed necessary. It is made by a statute, often crudely and imperfectly worded. The statute is then expounded by the courts as occasion arises. If the statute as interpreted (as is frequently the case) falls short of or goes beyond or fails to meet the end desired, another and often several additional enactments are passed. So the work of amendment and re-amendment and judicial interpretation

[1] See paper of writer, read before the American Bar Association, August 18, 1886, entitled "Law Reports and Law Reporting."

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"goes on, till we have a series of statutes, which to an uninitiated observer might seem to deal with their whole subject, *but are really mere islands scattered in an ocean of case-law.*" And thus, of necessity, the law on any special point has to be deduced as the result of an inquiry into the common law, and a study of the legislation and of decisions under different statutes.

But it is judiciary or case law that chiefly gives to our jurisprudence its enormous bulk. This law is to be found in the judicial reports of Great Britain and America. The number and multiplication of the law reports in these two countries is mainly owing to the doctrine of *judicial precedent*, a doctrine peculiar, in its character and scope, to the English and American law. That doctrine is shortly this: That a decision, by a court of competent jurisdiction, of a point of law lying so squarely in the pathway of judicial judgment that the case could not be adjudged without deciding it, is not only binding upon the parties to the cause in judgment, but the point so decided becomes, until it is reversed or overruled, not merely *evidence* of what the law is in like cases, *but the very law itself*, which the courts are bound to follow and apply, not only to cases precisely like the one which was first determined, but also to those which, however different in their origin or special circumstances, stand or are considered to stand upon the same principle. In continental Europe a judicial decision has no such authoritative force in any other case, whether in the same or any other court. But in England and in this country a point of law solemnly decided has the force and effect of law, binding the judges in all other cases that fall within its principle; and the judges are therefore bound, "unless it be flatly absurd and unjust," to follow and apply it.

The direct effect of the authoritative force thus given to judicial judgments has been the publication of the Law Reports, which are extant from the time of Edward II, covering a period of over 500 years. In 1881, the English Law Reports, of all kinds, numbered 2944 volumes, and at present their number is somewhat over 3000 volumes. The American Law Reports already exceed in number the English, being at this date not

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far from 4000 volumes.[1] The increase in both countries is not less than 100 volumes per year. If we add to the English and American reports the statutes and the text-books of both countries, a complete law library (and a complete library is essential to thorough work) consists of probably not less than 10,000 volumes.

It may be asked: Why not keep the judiciary or case law within more restricted limits? The answer is, that however desirable this may be, it is impracticable. A study of the Roman and European systems of law shows this to be impossible. Case law is part of the legal systems of continental Europe, minus simply the element of *authority* which it has in England and America. Therefore, as judiciary law is a necessary and indestructible part of every jural system, and peculiarly of our legal system, the publication of reports of adjudged cases will doubtless continue in the future, as in the past, without substantial restriction. So long and so far as the bar find the reports to be necessary or useful they will be published, and I am unable to see any material checks which we should be warranted, or which it would be practicable, to put upon such publication by legal enactment, however desirable it is to keep case law within more circumscribed limits. There is no reason to doubt that the judicial reports will continue to increase as rapidly as ever, adding to the bulk and to some extent to the

[1] In August last, the writer addressed an inquiry on this point to the Librarian of the New York Law Institute, and received the following answer:

"LIBRARY OF THE NEW YORK LAW INSTITUTE,
Rooms 116–123, Fourth Floor, P. O. Building,
NEW YORK, August 19, 1886.

DEAR SIR: In answer to your inquiry, I may state that the list below was carefully compiled by my associate, Mr. William H. Winters:

Federal Reports to Dec. 31, 1885	409
Miscellaneous American Reports	203
American State Reports	3186
	3798
American Law Periodicals, Dec., 1885, not existing	575
" " " " "	702

Very respectfully yours, JOHN M. LODEWICK.

To Hon. John F. Dillon."

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uncertainty of the law, and this will go on and on until the effect becomes at length insupportable.

The American Bar Association, in August, 1886, considered various suggestions made with a view of preventing the present rapid increase of law reports, and reached the conclusion, in effect, that there was no expedient remedy.[1]

III.

This very bulk, co-operating with the intrinsic and essential nature of case law, and the casual and fragmentary course of legislation already adverted to, tends to create confusion and uncertainty. Under the conditions already considered, the consequence has been that the law has necessarily had an irregular and often incomplete development. Judicial power can of course be exerted only as cases arise for decision. It is entirely fortuitous when, if ever, a given point will arise for judgment, and only such points as actually arise can be authoritatively dealt with by the courts.

Mr. Pollock has given several interesting illustrations of the wonderfully uneven and anomalous growth of case law, as a result of its dependence upon "the casual exigencies of litigation to determine what parts of it shall be filled up and what left incomplete," observing, and truly, that "all kinds of curious little questions receive elaborate answers, while great ones remain in a provoking state of uncertainty."[2] The experience of every practicing lawyer will supply him with additional illustrations of this well-known fact.

Not only is case law incomplete, but the multiplicity and conflict of decisions is one of the most fruitful causes of the

[1] The views of the Association were embodied in the following resolution: "That while this Association records its approval of the present tendency of the judges to write short opinions, especially in cases turning on facts and those not useful as precedents, and doubts the utility, in the present state of the law, of the use of decisions of inferior courts as precedents, it does not deem it practicable to interfere by legislation to prohibit or limit the publication of any class of reports; and that the evils of the great volume of judiciary law must be remedied otherwise than by legislation restricting absolute freedom in the publication of adjudged cases."

[2] Essays on Jurisprudence and Ethics, ch. iii.

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unnecessary uncertainty which characterizes the jurisprudence of England and America. Thousands of decisions are reported every year. An almost unlimited number can be found upon almost any subject. What any given case decides, must be deduced from a careful examination of the exact facts and of the positive legislation, if any, applicable thereto. A general principle will be found adjudged by certain courts. Other courts deny or doubt the soundness of the principle. Exceptions are gradually, but certainly, introduced. Almost every subject is overrun by a tropical redundancy of decisions, leaving the most patient investigator entangled in doubt. In his helplessness and despair, the lawyer, wearied with the toilsomeness of an unsatisfactory and unrewarded search, is too often tempted to wish all the reports "in the deep bosom of the ocean buried."

The extent to which this condition of our law increases the labors of the bar and bench is much greater than is apt to be supposed by those who have never reflected upon it. As matters stand, it is a work of necessity in almost every important case, not clearly controlled by special legislation or by an established line of precedent in the particular state, to examine all the English and the more important American reports for decisions which will sustain your position, or which oppose the position of your adversaries.

The report of the special committee of the American Bar Association, made August, 1885, contains some instructive statements on this subject, which show the loss of time and labor caused by the necessity of a resort to the reports of so many different states and countries in order to ascertain, if possible, what the law is upon subjects which form the staple of current litigation. An extract from this report contains facts that will strike the reader with astonishment. The committee says:

> In proof of uncertainty we can easily find the number of reversals in each state. We content ourselves with four states. An examination of the last volume of reports of decisions in the courts of last resort of New York, Pennsylvania, Ohio, and Virginia respectively, four states which

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may be considered representative, and which have courts of appeal separate from the courts of first instance, gives the following results: Volume 97 of the reports of the New York Court of Appeals contains 79 decisions, of which 38 were reversals. The judges cited in their opinions 449 decisions, being 353 made in New York, 56 in England, Scotland, and Ireland, 8 in our Federal Courts, 7 in Massachusetts, 4 in Pennsylvania, 3 in Vermont, 2 in Connecticut, 2 in New Hampshire, 2 in California, 2 in Minnesota, 2 in Alabama, and in New Jersey, North Carolina, Kentucky, Florida, Virginia, Indiana, Maine, and Iowa, 1 each. Volume 105 of the Pennsylvania Supreme Court Reports contains 95 decisions, of which 44 were reversals. The citations of the judges were 451. Volume 39 of Ohio Supreme Court Reports contains 98 decisions, of which 46 were reversals. The citations were many. Volume 78 of the Virginia Supreme Court Reports contains 81 decisions, of which 40 were reversals. The citations were 576. The forces of these citations made by the judges of Pennsylvania, Ohio, and Virginia, in their opinions, were as various as those made by the judges of New York.

These were the decisions cited, examined, and commented on by the judges in making up their own opinion. But the decisions cited by counsel and pressed upon the judges for their consideration were, it is safe to say, ten times as many. *In volume* 88 *of the New York Reports, the number of cases cited by counsel was* 5037. A single case reported in volume 97 shows that counsel on the two sides cited 285 decisions, of which 125 had been made in New York, 61 in England, 2 in Ireland, 4 in Pennsylvania, 4 in North Carolina, 4 in Massachusetts, 2 in New Hampshire, 2 in New Jersey, 2 in Kentucky, 2 in the Federal Reports, and from Maine, Vermont, Iowa, and South Carolina, 1 each.

IV.

Such being the acknowledged and undeniable condition of our law, the practical and pressing question is: What can we do? Where is the remedy? Is there no balm in Gilead? Is there no physician there? This is a difficult subject, but sooner or later it must be met and dealt with.

There inevitably comes a stage in the legal history of every people when its laws become "so voluminous and vast" that an authoritative and systematic recompilation or restatement of them, to the end that they may be accessible, and — to use, in default of a better, Mr. Austin's uncouth but expressive word — *cognoscible* to those who are governed by them, or at

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least to those whose business it is to advise concerning them, and to those whose duty it is to administer and apply them.

The Roman law, by means of commentaries on the XII Tables and on the Prætorian Edict, and imperial constitutions, decrees, edicts, and rescripts, had, before Justinian, attained to such proportions that it was said to be the load of many camels. The Roman situation was tolerable compared with ours. Our judiciary law, which embraces that of England, now runs back through several centuries, without revision or authentic restatement. It is scattered through volumes so numerous that the memory is taxed to its utmost to remember even their names, that only the rich can buy them, and that the practicable industry and strength of no human being can examine, much less study and digest them. In short, the bulk of our judiciary law is now such that it may, without exaggeration or metaphor, be fitly described as the load of many cars.

Remedies have at different times been suggested, but never comprehensively applied. Two hundred and fifty years ago, the amending and compiling of the laws of England engaged the serious attention of Lord Bacon. It was with him a favorite subject. As to the reports, his scheme contemplated their condensation by expurgation of overruled and useless cases and matter.[1] There were at that time comparatively few reports,

[1] Bacon's plan was comprehensive. It embraced the reduction of both the statute and the common laws to a system. We omit any reference to his suggestions as to the mode of dealing with the statutes. What he proposed to do with the judiciary or case law it will be instructive to consider, since it will show that he comprehended the subject in all its bearings. His scheme for compiling and amending the laws of England, as proposed to King James, consisted of two parts — "the digest or recompiling of the common laws, and that of the statutes."

By the former, he meant mainly "the reducing or perfecting of the course or corps of the common laws"; by which he meant "that there is to be made a perfect course of the law," *in serie temporis*, or year books, as we call them, "from Edward the First to this day." In compiling which there is to be observed the following points:

1. All overruled cases are to be left out.

2. There are also to be left out "all cases, wherein that is solemnly and long debated whereof there is now no question at all; but the judgments only and resolutions shall be included, without the arguments, which are now become but frivolous," *i.e.*, unnecessary. The decisions, however, are to be accompanied with a memorandum explaining why the cases are not given at length, and where they may be found.

3. All cases "merely of iteration and repetition are to be purged away"; and of

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and his scheme was then practicable. It is not so now. It was not a radical but a very conservative remedy. It related more to form than substance. This he is very careful to state in his *Proposal* to King James, wherein he says:

> The work which I propound tendeth to pruning and grafting the law, and not to ploughing up and planting it again; for such a remove I should hold indeed for a perilous innovation. But in the way I now propound, the entire body and substance of the law shall remain, only discharged of idle and unprofitable or hurtful matter; and illustrated by order and other helps towards the better understanding of it and judgment thereupon.[1]

Lord Chancellor Westbury, as late as 1865, proposed from the woolsack to the House of Lords a project "to revise and expurgate the unwieldy and still increasing mass of the decided cases, reducing them to such as constituted the body of existing authorities, and which might, in their turn, be digested and arranged." This, it will be perceived, is substantially Lord Bacon's idea. As Lord Westbury soon afterwards closed his official career, like his great predecessor, with the loss of the public confidence, the stupendous undertaking which he proposed dropped with his retirement.

"cases of identity, [those] which are best reported and argued to be retained in stead of the rest," with a proper reference to the omitted cases where the point is argued at large.

4. Conflicting cases to be "specially noted and collected that they may be put into certainty, either by assembling all the judges in the Exchequer Chamber or by Parliament."

5. "All idle queries, which are but seminaries of doubts and uncertainties, are to be left out, and no queries set down but of great doubts, well debated and left undecided for difficulty; but no upstarting queries which were better to die than to be put into the books."

6. Cases reported with too great prolixity to have their tautologies and impertinences cut off, and put into a more compendious report.

The course being thus compiled, for the future the cases should be reported by official reporters "who should be grave and sound lawyers, with an honorable stipend."

When we consider the comparatively small number of statutes and reports which existed at that time, the scheme which he propounded was practicable, "with assistance," and if executed as proposed would have greatly reduced the bulk and improved the character of the English law.

[1] Lord Bacon's Proposal for Amending the Laws of England.

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Such a work is theoretically possible, but is so vast and difficult that it could not be accomplished without the authorization and aid of Parliament, and it does not seem probable that it can receive, *per se*, the Parliamentary sanction; and I venture to predict that it will never be done unless possibly as preparatory to a general scheme for the revision and consolidation or codification of the statutory and judiciary law of the realm or specified departments of it.

It is not possible to doubt that the bulk of the existing law can be greatly and advantageously reduced. This is, in fact, demonstrable, both by reasoning and examples. Cases do not constitute the law, but are illustrations of its general principles. These principles are comparatively few. Lord Mansfield went to the pith and marrow of the business when he said: "The law does not consist of particular cases, but of general principles which are illustrated and explained by those cases."[1] It is therefore practicable to extract these principles and state them in authoritative form. This is, undoubtedly, as Lord Hale says, "a very choice and tender business," and must be performed deliberately and by the most competent hands.

Mr. Justice Stephen's *Digest of the Law of Evidence* is an example, among others, of what may be done in this direction. Mr. Taylor's *Treatise on Evidence* contains, says Mr. Justice Stephen, 1797 pages, refers to 9000 judicial decisions, and cites nearly 750 acts of Parliament. Mr. Greenleaf's work is quite as extensive. Now Mr. Justice Stephen extracts the essential principles of the law of evidence, states these with precision, illustrates them by examples, arranges them in a systematic form in 143 articles, all of which, with annotations and references to the American cases by Professor Chase, is brought within the moderate compass of 245 pages.

The codification, in 1882, by authority of an act of Parliament, of the law relating to commercial paper, is another example of the condensation to which it is practicable to subject our overgrown and expanded law.

In suggesting the remedy, I have thus far carefully avoided

[1] Rex *v.* Bembridge, 3 Douglas, 332.

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the use of the word "code," since this is a word to which such a variety of meaning is attached, that it seems to be essential either to drop it from the discussion, or first of all to fix and define what is meant by it. If it means a general abrogation of existing laws and rules and the substitution of an entirely new system, and to that end to consign the law reports to oblivion, it has very few advocates, and I am not among them. Such, however, is not its necessary meaning. Mr. Justice Stephen thus expresses his view of a code:

> A code ought to be based upon the principle that it aims at nothing more than the reduction to a definite and systematic shape of the results obtained and sanctioned by the experience of many centuries.[1]

Such a code has many advocates, and I am among them.

A code, according to my conception, differs from a mere revision, consolidation, or digest of existing statutes; since it is essential to any practicable or desirable scheme of codification, whether it is general or confined to a particular branch, that it shall derive the elements of its chief value from the existing body of case law and statute law; removing therefrom what is obsolete, needlessly technical, inconsistent, or superfluous; settling obscure and doubtful points; expressing well-settled principles of general interest or utility; filling up with a cautious hand the interstices which the irregular development of law as a result of the exigencies of litigation has shown to exist; and then arranging the whole in a definite and systematic form. Codification in this sense I believe to be both practicable and expedient, whenever it can be well and thoroughly done. I also believe that the best interests of the community and of the profession require that the work, great and difficult, choice and tender as it is, should be undertaken, and that it cannot much longer be delayed.

It is possible that the future history of the law may show that a more radical remedy than the one above outlined is the true one, and the only one that will adequately meet the necessities of the case; and such was Mr. Bentham's opinion. He

[1] Sir James Stephen, History of Criminal Law, III, ch. xxxiv.

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would use the reports as supplying all the needed materials for the composition of a complete body of law, supplemented by the legislation necessary to fill up the *lacunæ* found to exist; and without reference to old forms, conceptions, or terminology, cast all of this into a new mould, and into a new arrangement based upon logical principles rather than the usual existing divisions and titles in the law. This is the ideal code of the future. There are many who believe that this is the sound and true solution of the difficulties that confront us, and that the next fifty years will witness the consummation of the revolution in the condition of the existing law which this view implies. It will not do hastily to pronounce this to be chimerical or empirical; and I may on some future occasion express somewhat at large my notions, based upon some study and reflection, concerning it.

JOHN F. DILLON.

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STATE STATUTE AND COMMON LAW.

CODIFICATION has been a subject of debate in this country for about half a century. There has been discussion enough, one might naturally assume, if not to settle the question, at least to illuminate it upon all its sides and to furnish all the data for its settlement. Nevertheless, the most important side of the question has scarcely been examined. The attention of the debaters has been centred upon the direct results of codification — upon its immediate advantages or disadvantages. It may be shown, I think, that the direct results for good or for evil are much less considerable than the friends and opponents of the movement have maintained, and that the question of real moment is this: How will codification affect the development of our law in the future? This question is really twofold:

1. What will be the effect of codification upon the legal development of the codifying state?

2. What will be the effect of the general adoption of state codes upon the general development of American law?

About the first of these questions there has been much debate, although the issue has not always been clearly formulated. The second question, so far as I know, has not even been put.

I.

The law of the American colonies, like the rest of their civilization, was English; and the development of American law, however modified by new conditions and alien grafts, has been and is a growth from English roots. The English law which the colonists brought with them and by which they lived — avowedly, in most cases; actually, where they did not avow it — was case law, *i.e.*, judge-made law. It had been developed by the courts. It could be changed by king and people, acting together in Parliament, and such changes were made from time

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to time; but they did not compare in number or importance with the changes made by the courts. Besides the law-interpreting power — which is always to a greater or less extent a law-making power — vested in the ordinary courts, the chancellor wielded the law-overriding power of the crown, the old-Germanic right of the king to substitute equity for law; and every student of English legal history knows to what an extent the latter power was exercised.

The United States emerged from the war of independence with this body of English judge-made law as the basis of their legal development. As means of legal development they had all the English factors: the interpreting power of the ordinary courts; the extraordinary powers of the courts of equity; and statute, or act of legislature. They had also the English theory of the relative power of these three law-making organs, according to which equity overrides common law, and statute supersedes both. In addition to these, they devised a fourth form of law, dominating all the others. The people themselves, in state and nation, created written constitutions. As constitution-making power, the people legislates directly; and such legislation overrides, of course, all ordinary statute.

In studying the development of our law during the past century, we observe, in the first place, that the extraordinary powers of equity have counted for very little. The creative movement of English equity had spent itself long before the separation of the colonies. It had left a tolerably well-settled body of rules superimposed upon the common law, and the courts of equity had come to limit themselves to interpreting and applying these rules. In the United States, the tendency has been to intrust the enforcement of both bodies of law to one set of courts; and we have to come to use the phrase "common law" as including equity, *i.e.*, as including all judge-made law. The word will be so used in the remainder of this paper.

All the other law-making factors have continued active and productive. The highest courts of the different states have continued to modify and develop the common law by decisions; the legislatures have issued annual or biennial volumes of ses-

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sion laws; and the people, from time to time, has revised and modified its state constitutions. But when we examine the legal development in our states more closely, we see a marked tendency of the superior law-making power to encroach upon and narrow the field of the inferior. Our state constitutions limit the power of the legislatures. Many of their provisions are restrictive in form, prohibiting the legislature from doing certain things; all are restrictive in fact, since the legislature must legislate in accordance with the constitution. And the constitution-making power has by no means confined itself to the domain of the organic public law; the provisions of the state constitutions, particularly in the newer states, touch every branch of the law, public and private, and their scope widens with each revision.[1] In like manner, we find the legislatures encroaching upon and narrowing the power of the courts; not expressly by restrictive statutes, but in fact. Whenever a legislature regulates by statute a matter previously governed by common law, it diminishes *pro tanto* the power of the judiciary. This is obviously true whether the statute change the rule of common law or not. As long as the rule rests upon decided cases, the judiciary can in fact change it by re-examination and re-interpretation of the cases in point. As soon as the rule becomes statutory, the court is restricted to the interpretation of the particular form of words which the legislature has seen fit to employ. The same limitation of the judicial power may sometimes be accomplished when a new statute is passed to meet an entirely new question, if the matter be one with which the courts might have dealt. The legislature, in such cases, seizes ground which the courts might have occupied. So whether it simply re-enacts or changes or adds to the common law, each legislative act invades and lessens the power of the courts. The moment any relation of our social life is regulated by statute, the development of the law governing that relation is substantially barred to the courts and must be obtained from the legislature.

From this point of view, "codification" of the law is simply

[1] Stimson, American Statute Law, preface,

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an attempt to do all at once and once for all what appears to be going on gradually without codification. For codification, in so far as it is opposed and has become a subject of debate in the United States, does not mean the orderly arrangement of that portion of the law which is already statutory, — nobody objects to periodical revision of statutes, — but the transfer from the courts to the legislature of the future development of all our law; the elimination, as far as may be, of the judiciary as a factor in the making of our law.

This issue has seldom been squarely presented. American lawyers are not in the habit of arguing abstract questions, and the question of codification never becomes a burning one until the bar of a state is actually confronted with a draft code. Then the discussion necessarily turns, to a great extent, upon the merits or demerits of the particular code which is proposed for adoption.[1] Of course the general question is also discussed; but the real issue is commonly darkened by arguments, or assertions rather, of an extremely absurd kind. The opponents of codification have sinned in this respect almost as grossly as its friends.

The anti-codifiers have maintained again and again that it is "impossible" to reduce the common law to statutory form. If by that they merely mean to say that no human ingenuity can construct a series of statutes, or a code, which shall answer every possible legal question justly and *directly*, *i.e.*, by the simple application of one or more sections to the case in point, without resort to deduction or to inference from analogy, — if they merely mean to deny the possibility of codification in this sense, no sane person will dispute their position. But no sane person at present proposes to make such a code.[2] On the other

[1] This has notably been the case in New York. The so-called "Field code" is opposed on the ground that it is unscientific in structure and inaccurate as a presentation of existing law. It was vetoed on that ground by Governors Robinson and Cornell; and on that ground it was rejected by the legislature in 1885 and again in 1886.

[2] Bentham contemplated the establishment of such a code. He did not think it could be perfected at first essay; but it might gradually be perfected, he thought, by a series of additions. The courts were to have no power of filling open places; the code should be made complete by statutory amendment. See his General View of a Complete Code of Laws, ch. 31 and 34; Works, Bowring's ed., III, 205, 206, 209, 210. — The idea was a common one in the XVIII century. "New law-books were

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hand, if they mean to say that the common law cannot be crystallized into forms of words and set forth in rules, the answer is, that this is not only possible, but is in fact precisely what the English and American courts have been doing ever since they began to decide cases. No case was ever decided without affirming or modifying an old rule or setting up a new one. If at the outset a rule is stated too broadly or too narrowly, if its first formulation is crude and unsatisfactory, it is narrowed or extended by subsequent decisions — in other words, it is amended — until it becomes satisfactory. But at every stage of its development the common law is just as truly a body of positive rules as is any book of statutes.

On the other hand, one of the favorite arguments of the codifiers is equally baseless. They assert that everybody "has a right to know the law" — which nobody disputes — and that codification will make the law intelligible to everybody — which is nonsense. For a codifier necessarily does one of two things. He either states the existing rules of law in the technical language in which they are already clothed, or he restates them in other words which are not technical, and which "everybody understands." In the first case it is obvious that the layman is little

demanded, which, by their completeness, were to give a mechanical certainty to the administration of justice. The judge was to be relieved from the necessity of exercising his own judgment and restricted to the literal application" of the provisions of the code. Savigny, Beruf unserer Zeit, 3te Aufl., S. 5. — The Prussian Landrecht of 1794 was meant to be a code of this sort. The codifier attempted to forecast all possible questions. "The consequence of this was the introduction of numerous casuistic passages, which were based on no general principles, and which, therefore, instead of making the law clear, gave the best possible basis for doubts." Die neueren Privatrechts-Kodifikationen, S. 366, in Holtzendorff's Encyklopädie der Rechtswissenschaft, 4te Aufl., 1882. The courts were not to decide doubtful points, but to ask for instructions from a legislative commission in Berlin. The legislation thus obtained was to be added to the code. One such supplement was issued, April 11, 1803; after this, the construction of the law was left to the courts. *Ibid.*, S. 366–8. — The Prussian experiment has never been repeated.' The code Napoleon provides, in art. 4: "The judge who shall refuse to render decision under pretext of the silence, the obscurity, or the insufficiency of the law, is to be prosecuted as guilty of denial of justice." The penalty is fine and suspension (code pénal, art. 185). — None of the codes adopted or proposed for adoption in the United States have attempted to realize the Benthamite ideal. Mr. David Dudley Field has expressly repudiated it. See his article on codification in the *American Law Review*, vol. xx, no. 1, pp. 1, 2.

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advantaged. It may be easier for him to find the rule, but it is no easier for him to understand it. In the second case, he appears to be better off — but is he? Every lawyer knows that the restatement of a legal rule in popular phraseology simply makes its application uncertain. He knows that the law is clothed in technical phraseology simply because it is necessary to have words of which the meaning is absolutely certain. He knows that the only difference between a technical phrase and a phrase of common speech is that the one has a definite sense and the other a variety of possible meanings. But it has always been singularly difficult to get this fact through the head of the average layman. Every doctor of theology or medicine, every scientific man, every artist, every tradesman and every mechanic uses in his own science or business technical terms which are unintelligible to the outsider. Even when the term is explained, it is quite likely that the outsider will not understand the explanation, because it involves the understanding of other things unknown to him, the knowledge of which is part of the science or craft in question. Now all these people use technical terms for the same reason that the lawyer uses them — because they need terms of definite meaning. This necessity, felt in the simplest trade, is greatest in the sciences. And yet all these people demand that the law, the oldest and perhaps the most complex of sciences, shall speak the language of the hearth and the street. It seems a waste of effort to combat such a demand, resting upon such a delusion. But if it be a waste of effort, it is not because the delusion is obvious, but because it is imperishable.

Not a few lawgivers have shared it, and have attempted to "popularize" the law. The result has always been the same. As soon as a set of new, vague, and "popular" terms is bundled into the written law, the courts proceed to give them, by construction, that definiteness of meaning which legal science requires — and which in fact the people themselves demand, for the people demand that law shall be certain. That is, a set of new technical terms is constructed.[1] In the meantime, not

[1] So in California. See J. N. Pomeroy, The Civil Code in California, pp. 7, 17, 18 *et passim*.

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even the lawyer knows what the written law means; and the layman is worse off than before, because he thinks he knows what it means. He is not to blame; he has been told, by those who ought to know better, that the law can be made perfectly intelligible to him. He therefore attempts to act as his own lawyer — with the proverbial result. Of course he is made no wiser by the event. He simply abuses the "pettifogger" on the other side, who by captious construction has wrested the statute from its true meaning, and the judges who have decided inequitably on "technical" grounds. He will not recognize that the law is a science, and that a science cannot be mastered without study.

Much less can he be brought to understand that the law is simplified in proportion as it becomes more scientific, and that there is no other way given among men by which it can really be simplified. The relations of man to man in civilized society are not few or simple, but infinitely varied and complex; and if the legislator attempts to set up positive rules directly regulating every possible relation, there can be no limit to the number of the rules. Legal science analyzes and classifies these relations and posits general rules to govern the groups of relations which it has created. The further this process is carried, the more simple the law becomes. The jurist who finds a rule burdened with a number of arbitrary exceptions and sets in its place a rule that includes the exceptions, or who brings a number of apparently isolated rules under a single principle of which they are thenceforth corollaries, — he it is who simplifies the law. He does not make it any more intelligible to the layman, but he makes it easier for the advocate and the judge to master and apply it.

There is, then, nothing in the nature of the rules of common law which prevents their being enacted as statutes; and there is nothing in such enactment which makes the rules simpler or more intelligible. The only direct result which can be accomplished by codification is to make the rules more accessible. Upon this point the advocates of codification lay great stress. The common law, they say, is scattered through an immense

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number of cases. Reports of decisions have been accumulating for centuries and already fill thousands of volumes. It is in this chaos of cases that we must search for the rules of our law. The number of cases cited in briefs and decisions is appalling. Why should we not collect the rules of the law in a code?

The argument seems a strong one. The evils deplored are undeniable, particularly the multiplication of citations. But are these evils wholly due to the nature of case law? Would they be wholly removed by collecting the rules of the common law in a code? Is it true that the lawyer and the judge have to search through hundreds of cases to find the *rule* which they need, or do they search for guidance in the *application* of the rule to the concrete case before them? I do not believe there are two answers to these questions. Now if the multiplication of citations is due to the attempt to find guidance in the application of the rule, — to find a case running "on all fours" with the case before the court, — what will it avail us that the rules themselves are in a code? They will still be interpreted and applied in the light of old and new cases, until our adherence to precedent becomes less slavish, and our lawyers acquire more of that independence in juristic thinking which characterizes the bench and the bar of France and Germany. Nothing but a complete reform in our legal science will give them that independence; a code will not do it.

It may be admitted, then, that codification will make the *rules* of the law somewhat more accessible; but the greatest difficulty, that of their *application*, is not lessened. This distinction is extremely important. It greatly lessens the force of another argument which constantly appears in the discussion of the code question, and upon which the friends of codification lay great stress. They say that the common law is not only inaccessible but uncertain; that it is not only difficult to find the law in the constantly increasing mass of cases, but that careful exploration discloses important contradictions and conflicts in the law. Here again it will be found, in almost every instance, that the conflict of authorities is in reference to the application of a rule which is itself

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undisputed. How will this evil be abated by putting these undisputed rules into a code? Where the conflict of authorities is serious, it doubtless indicates that there is something wrong about the rule — that it is ill formulated. What will it profit us, if that is the case, to have the ill formulated rule made statutory? We shall be worse off than before, by as much as it is harder to get an act of legislature than a decision of the highest court. — I exclude the hypothesis that the codifier is to find that happier formulation which the courts have been vainly striving to discover, because, in the first place, the advocates of codification themselves insist that a code shall simply enact the existing rules, not change them; and because, secondly, it is not to be assumed that we shall be able to get our codes made by men possessed of more than the average wisdom of the wise men of their own day.

That the uncertainty of the law lies almost entirely in the *application* of its rules is a truth that would soon come home to us if our law were wholly statutory. In the case law which has grown up about the codes of France and Germany, there are quite as serious contradictions and uncertainties as in the case law of any state in our Union. He who would satisfy himself that this is true of French law need not struggle through the voluminous *Jurisprudence Générale* of Dalloz; any standard handbook of French civil law will answer the purpose. In fact, we need not go so far afield for our evidence. We have been living under a constitutional code for a century. It was drafted by able men, wise in statecraft and learned in the law. They sensibly used, as far as possible, words and phrases whose meaning had been settled by centuries of constitutional conflict and judicial interpretation. Has there been no uncertainty in the construction of our Federal constitution? Is there no uncertainty to-day?

Unfortunately we have here again to deal with a delusion that seems indestructible. Neither reason nor experience seems to shake it. It is as old as the XII Tables and as new as the proposed civil code of New York.

The points thus far made may be summarized as follows:

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Codification of the common law is perfectly feasible if too much is not attempted. It is not possible to make a code that will settle everything, that will wholly free the courts from the duty and deprive them of the power of interpreting and applying the law; but it is quite practicable to make a code that shall contain the positive rules which now rest upon decisions. The immediate results of such codification will not be very great. The law will be made somewhat more accessible; but it will not be made any more intelligible, nor much more certain; nor will the practice of citing cases be abandoned. But the ultimate results may be quite serious. As soon as the rules that now rest upon decisions become statutory, they are withdrawn from the control of the courts. The judges retain a certain power of construction, but have no longer the power of change. Judicial legislation comes to an end, and the development of the law passes wholly into the hands of the legislatures. Is this a thing to be desired? The question, as was said at the outset, must be divided: (1) Is such a change in the interest of the people primarily affected, the people of the codifying state? (2) Will it be better for the whole people, the people of the United States, that the law now made by the judges be henceforth made by the legislatures of the different states?

Neither of these questions can be intelligently discussed until we know *what part* of the law the change will affect — what part of the law, if any, has generally escaped enactment and still rests upon cases. And the second question cannot be satisfactorily answered until we know how far the state legislatures are modifying and adding to the general or common law, and how far their innovations are producing divergences and conflicts of law. Until these preliminary questions of fact are answered, the discussion has no solid footing; it is in the air. But no one can answer these questions who has not made minute study and careful comparison of the statute law of all our states. It is fortunate for my present purpose that I have been able to obtain an answer which rests upon and derives authority from such a study of our state laws.

MUNROE SMITH.

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II.[1]

It is obvious that there are four possible ways of dealing by statute with existing law. It may be expressed and formulated, *i.e.*, enacted or codified; it may be added to; it may be altered; and it may be repealed. Let us briefly describe these processes as enactment, addition, change, and repeal. Including the national Congress and the territorial legislatures, there are forty-seven legislative bodies in the United States, with powers more or less sovereign; and these have been at work an average of some fifty years apiece. There is now a distinct tendency to reduce the length and number of sessions; but although there remain but five states with regular sessions so often as once a year, and many western states have shown a desire to limit the session to sixty or ninety days, there are still held, in fact, some thirty sessions of legislative bodies each year within the limits of the national territory, having, in effect, full power to alter or repeal the law. And as few of these bodies have any reverence for the common law as such, it must be a wonderful vitality that has kept it so little impaired as it is.

Of repeal, there has been very little; of change, not very much; of enactment, a great deal; and of addition, still more. And, if we may speak at once of tendencies and of the future, this statement needs but to be emphasized to continue true; there is almost no repeal and change, but an enormous amount of enactment and addition now in progress. This tendency is most exaggerated in those communities which, like California and Dakota, have had the shortest experience of government; but beyond this it is difficult to make a general statement. The tendency to codification, which is, of course, almost complete *enactment*, and is generally accompanied with much *addition* and even considerable *change*, is a sporadic and disturbing one, and has shown itself in states as wide apart as Georgia, Iowa, New York, and California, while the neighboring states of Mississippi,

[1] This part of the article is furnished by Mr. Frederic J. Stimson, the compiler of "American Statute Law." It was undertaken by him at the special request of the Editors.

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Nebraska, New Jersey, and Oregon still have the common law almost intact. It seems impossible to keep the civil, or continental, law out of a *code*. And let us note here that in saying code, codification, *etc.*, we should look at things, not names, meaning by these terms always a more or less complete enactment of the common law, and not a mere re-arrangement of previously existing statutes. Many so-called codes are mere revisions; many revisions, "General" or "Public Statutes" are in effect codes. Codes of practice and criminal codes are much more common than general common law codes; but as the latter are much less radical and the former are less important, we need not consider them here.

Keeping these statements in mind, it may be interesting to roughly cast the result of an elaborate investigation of the laws of all our states and territories. As the code states, properly speaking, may be classed Ohio, Georgia, Iowa, Texas, California, Dakota, Montana, Utah, and Wyoming; though in several other states the statutes are termed codes. New York, Illinois, Indiana, Michigan, Wisconsin, Minnesota, and Alabama go very far in what we have termed *enactment*, and in *addition* also; Massachusetts, Maine, Kansas, Nebraska, North Carolina, Tennessee, Missouri, and Arkansas are generally inclined rather to add to, and occasionally alter, the common law than to express it in their statutes. New Hampshire, Delaware, New Jersey, Pennsylvania, Virginia, Kentucky, and South Carolina are the most conservative, and retain the common law most nearly intact. Louisiana, New Mexico, and Arizona, for obvious historical reasons, present a curious mixture of the common law with law of French or Spanish origin; and there is a trace of this same mixture, but from other causes, in the laws of Iowa, Texas, and California.

Many states in terms enact the common law; that is, they adopt it and declare it to be in force "so far as applicable," "suited to the wants of the people," and not inconsistent with the United States constitution and positive enactments of the state. Two go so far in the opposite direction as to declare that "there is no common law in any case where the law is declared

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by the statutes." And the legal maxim requiring statutes in derogation of the common law to be strictly construed has almost generally been refused recognition, either by express enactment or by judicial decision.

The branches of law in which this divergence of statutes from the common law may be chiefly noted are scattered through all the four books of Blackstone, and it is hard to detect any distinct tendency in one direction rather than another. Of the matters treated by his fourth book, criminal law, there has been much enactment, but probably less real change, except as to punishments, than in others; and there has not been, comparatively speaking, a great deal of change in Blackstone's second book, "of the rights of things"; and the law of torts remains almost untouched by statute, except that in Illinois and a few other states the common law liability of the husband for his wife's torts is largely done away with, and her property is made separately answerable. It is quite impossible in the limits of this brief statement to treat this subject in detail; but it is perhaps worth while merely to summarize the results which such an investigation would probably obtain. Codes, of course, enact, or pretend to enact, everything; but leaving out the few complete codes, it may be stated that such of the common law as has ordinarily been *enacted* without much alteration includes principally the law of estates in land (except estates tail and joint tenancy and dower), powers, uses, trusts, the contract of marriage, the law of notes, bills, and negotiable paper, and of wills. *Additional* legislation, not necessarily altering the common law, but expressing it with new provisions and with far greater particularity, is chiefly noticeable in the law of the execution and record of conveyances, the law of mortgages and mechanics' liens, of fencing and draining, of limited partnership, and, above all, of marriage, both the contract and the relation. Positive *changes* of the common law have been made to the greatest extent in the tenure of land and the forms of conveyancing, in mortgage foreclosures, the law of landlord and tenant, of descent and distribution of intestate estates, of estates tail and dower, and of the property rights of husbands and wives

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generally; in commercial law, interest, usury, choses in action; in the law of aliens; and, above all, as before, in the law of marriage, of divorce, and of husband and wife.

It would seem, however, that but for one tendency, this force of common law modification had almost spent itself. Much the greater portion of the changes enumerated above were made and settled many years since, in the first fifty years of the Republic. In the older states at least, hardly more than one or two statutes which may fairly be said to modify the common law are now passed in the biennial sessions. But for one thing we might say we had reached a position of stable equilibrium. So marked and clear is this fact that it is the more surprising to have to make so vital an exception.

The thing referred to is, of course, this tendency, already mentioned, towards codification. Not only does codification necessarily re-enact the common law, if it does no more, but it nearly always adds to it, and very frequently changes it. The temptation appears to be irresistible to borrow elaboration and exactness from continental systems. And the impulse towards codification is certainly very strong at present.

Without being drawn into the argument for or against upon this point, we may therefore conclude that, while the common law has suffered extensive modification at the hands of our several state legislatures, it would appear now to be sufficiently adapted, as so modified, to the needs of the people; and many further changes in detail are not to be expected. But there is, on the other hand, a strong probability that the common law will be modified or suspended, *en bloc*, in many states, by the enactment of codes; and that at the same time a considerable mass of civil law provisions, or other continental law, will be let in. Whether, therefore, the common law of England is to be the future law of America, depends more largely upon our treatment in the several states of the codification question than upon any other single contingency.

FREDERIC JESUP STIMSON.

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III.

In all our states, it appears, there has been or is now in progress a gradual invasion of common law by statute, and consequently a gradual transfer of the law-making power from the courts to the legislatures; but unless codification is attempted, this movement stops short of the goal toward which it is apparently tending. A considerable part of the common law is cast in statutory form, a considerable part of their law-making power is taken from the judges, — and then every one seems to be satisfied, and nothing more is done until the code question arises. Mr. Stimson tells us that in the older states the gradual encroachment of statute upon common law ceased half a century ago, and that it is only in the younger states that it is still going on. This fact is extremely interesting and suggestive. Codification is demanded because of general evils alleged to be inherent in the nature of case law and general advantages that are to flow from the reduction of the whole law to statute. It is a *doctrinaire* demand. Our ordinary statutes are not made for *doctrinaires*. They are made to redress concrete evils and to satisfy concrete wants. If now the legislatures of the older states, during the past fifty years, have found no concrete evils to remedy and no concrete wants that lack satisfaction in the body of the common law — what is the inference as to the existence of the alleged general evils?

But how are we to account for the fact of encroachment followed by the cessation of encroachment; that is, how are we to account for *both* phenomena?

Judicial legislation is often assailed upon the ground that it is "undemocratic." It is said to be contrary to the genius of popular government that judges should make the law. The law, it is argued, is meant to realize the interests of the people, and the people is the best judge of its own interests. The law should, therefore, be the expression of the popular will; and the more directly the people is represented in legislation, the more completely does its will find expression. Whether this reasoning is sound or not, it cannot be doubted that the

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great majority of the American people thinks it sound. We have here a leading article in the orthodox democratic faith, based upon a deep-rooted popular instinct. And we have here, I think, the explanation of several phenomena in our legal history. The desire of the people to realize its will as directly as possible, explains the unpopularity of an appointed judiciary holding office for life. Such judges are too little dependent upon the people; accordingly, the people makes the office elective and limits its tenure. Even then the longer term and the traditions of the judicial office make the judges far more independent than the representatives who are sent annually or biennially to the capital. It is accordingly quite in harmony with the democratic idea that the legislature should despoil the judiciary of its law-making power. But there is still a more direct method by which the popular will can find expression. As constitution-making power the sovereign people declares its desires directly. That it has only to say yes or no to propositions framed by representatives or delegates does not seem to lessen the glad sense of power wielded directly. It is, therefore, quite in harmony with the democratic idea that the constitution-making power is encroaching more and more upon the legislatures. A similar phenomenon is observable in Switzerland, where the *referendum*, or direct appeal to popular vote, is constantly becoming more frequent.[1] — But if all this is true, if it is this democratic instinct which causes all these changes, including the encroachment of the legislatures upon the powers of the judiciary, why is the movement not carried through to its legitimate conclusion? How shall we account for the fact that in our oldest states the legislatures steadily widen the bounds of their activity for half a century, and then for the next fifty years leave the judiciary undisturbed within its narrowed domain? By what securer title do the courts retain this remnant of their former power? How is their continued and undisturbed exercise of the law-making power to be reconciled with the imperious desire of

[1] De Laveleye, The Recent Progress of Democracy in Switzerland, *The Nineteenth Century*, August, 1885.

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democracy to formulate its policy either by elected representatives or by *plébiscite?*

Another ground upon which judicial legislation is often assailed is its cumbrousness, slowness, and alleged general ineffectiveness. These accusations all touch the method; and it cannot be denied that the method invites criticism. In view of the history of our common law, it is an exaggeration to pronounce the method ineffective; but it cannot be denied that it is cumbrous and slow. Judicial legislation is hampered by the fiction that the courts do not make law, but only find it. Nobody really believes in the fiction, but few judges have been bold enough to defy it openly. Accordingly, when new law is needed, the courts are obliged to "find" it, and to find it in old cases. This can commonly be done by re-examination and re-interpretation, or, at the worst, by "distinction." By a combination of these means, it is even possible to abrogate an old rule and to set a new one in its place. When the old rule is sufficiently wormholed with "distinctions," a very slight re-examination will reduce it to dust, and a re-interpretation of the "distinguishing" cases will produce the rule that is desired. But all this takes time; and the process, scarcely intelligible to the layman, arouses his discontent. If it were intelligible to him, its apparent absurdity might arouse other and stronger emotions. — Here again we have grounds that seem sufficient to explain the gradual transfer of legislative power from the courts to the assemblies; but here again we are confronted with the question: Why does the movement stop uncompleted? Why is it arrested precisely during the half-century which has witnessed the greatest changes in our social and economic life? Are there portions of the law in which the slow and cautious legislation of the courts is preferable to the more rapid and trenchant operation of statute; and, in the gradual adjustment of boundaries between our law-making powers, have we unconsciously drawn a logically defensible line of demarcation?

I believe this to be the case. I think there is an inherent difference between the law of which the people and

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their representatives have assumed control, and the law which has been left in the hands of the courts. If this can be demonstrated, if we have reached an adjustment — or, to use Mr. Stimson's word, an equilibrium — which is capable of scientific interpretation, the fact is one of no little weight; for it shows that the adjustment is not accidental.

The division which has unconsciously been established, in the older states where no civil codes have been adopted, corresponds very closely to a distinction drawn by the Roman jurists. They clothed the distinction in words which have come to-day to bear a different meaning, *viz.*, *public* and *private* law. They defined public law as that portion of the law "which looks to the common weal"; private law as that portion "which looks to the advantage of individuals."[1] This distinction includes in the domain of public law much that we call private law; it includes all those rules governing relations between individuals, of which the purpose is not, primarily, to guard the interests of the persons directly affected, but the interests of the public.[2] But in whatever words we clothe the distinction, it is a real one. It is doubtless true, on the one hand, that all rules of law are intended *ultimately* to subserve the interests and secure the welfare of individuals; if not of every individual, at least of the majority. It is equally true, on the other hand, — and it is, in fact, but another form of the same statement, — that all law is *ultimately* intended to secure the welfare of the entire community; that it all rests upon social interests. But the general social interest is realized in part by imposing positive restrictions upon the activity

[1] Digest, 1, 1, 1, § 2.

[2] Hence the rule: "Public law is not set aside by pacts of individuals," which implies that private law may thus be set aside. Digest, 2, 14, 38; 50, 17, 45, § 1. *Cf.* 11, 7, 20, *pr.*; 26, 7, 5, § 7; 27, 8, 1, § 9; 35, 2, 15, § 1; 38, 1, 42. This rule would be unintelligible if their conception of private law had been as broad as ours. The mediæval jurists had somewhat the same distinction in mind when they divided law into *jus imperativum* and *jus dispositivum*; a distinction which modern jurists retain, and which the Germans express in the terms *zwingendes* and *nachgiebiges Recht.* But the old Roman distinction comes out most clearly, to-day, in the doctrine of the conflict of laws, when we say that foreign law will not be applied in derogation of a *lex fori* which rests upon "*public policy.*"

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of the individual, — for example, by punishing him for his acts, — and in part by giving play to the egoistic impulse and securing to the individual the fruits of his activity. We therefore find that, in fact, a portion of our law is *primarily* intended to realize the social interest or "public policy," and that another portion is *primarily* meant to secure the advantage of individuals.

If now we attempt to separate the different portions of our law by the test above indicated, we shall doubtless agree that political or constitutional law, criminal law and procedure, lie clearly on the one side of the dividing line, and a great part of our private law on the other. Civil procedure occupies an intermediate position; it is chiefly intended to realize and enforce the legalized interests or "rights" of individuals, but the organization of the courts and the rules of evidence and of appeal are mainly determined by the general or social interest. When we examine more closely the body of the private law, we shall at once recognize that the social interest is extremely direct and strong in the matters of marriage and divorce, and the property relations of husband and wife; in respect to the devolution of property by succession, especially *ab intestato;* and in the respect to the whole law of real property. This leaves upon the other side of the line the law of torts,[1] and the law of personal property and of contract; and here it will hardly be questioned that the social interest is best realized by giving freest play to individual activity.

How has the law actually been divided between our three law-making factors? The political law stands in our constitutions; but not the political law only. There are numerous provisions in these instruments touching other parts of the law. All of these express the strongest and most direct public interests. That is the reason they are put into the constitutions: the public interest at stake is so strong and direct, that the people desire not merely to bind the courts, but also to tie the hands of

[1] The law of torts is closely akin to criminal law as regards the matters with which it deals; but it is separated from criminal law by the precise distinction now in question — the distinction of the private or individual from the public or social point of view.

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the legislatures. The criminal law, Mr. Stimson tells us, has become mainly statutory. The legislatures have also made extensive inroads upon the law of the family, of inheritance, and of real property. Within these general divisions of the law, the careful reader of Mr. Stimson's statements will see that the legislatures have regularly possessed themselves of precisely those matters in which the social interest is greatest. The law of torts, of personal property, and of contract has been comparatively little touched by statute. This domain is therefore left to the courts.[1] The constitutional provisions which touch upon the law of contracts are general in their character, not regulative of detail. They are, in effect, negative provisions. They are intended to guarantee the freedom of the individual against encroachment. The legislatures are not to be permitted to interfere with the individual in this domain, because the public interest that might demand interference is deemed less weighty than the higher interest that demands freedom.

One of the questions raised in the preceding pages has already found its answer. The desire of the sovereign power in the state to realize its policy with greatest possible directness — a desire which has led the American people as constitution-making power to encroach upon the legislatures, and which has impelled the legislatures to invade and narrow the domain of judicial legislation — this desire has not resulted in the complete withdrawal of our private law from the control of the courts, because here the dominant interest is that of the individual, and the chief interest of society is to make sure that his activity shall have free play.[2]

[1] Mr. Stimson tells us that the law of notes, bills, and negotiable paper has been largely enacted; and that the law of interest and usury has been subject not merely to much enactment but to much change. There has also been much statutory innovation in the law of choses in action. In the last case (choses in action), the aim of the statutes has been not to restrict but to enlarge the domain of individual freedom, by creating new actions and by making actions assignable. In the law of interest and usury, the statutory restrictions have been dictated by a strong — although perhaps a mistaken — idea of public policy. The enactment of the law of notes, bills, *etc.*, rests, I think, upon a different ground, which will be explained later.

[2] The result of the foregoing discussion — *viz.*, that public law (in the Roman sense) must needs be developed by statute, while private law (again in the Roman sense) need not be so developed — was really reached inductively, in the way indi-

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A second question remains to be answered; *viz.*, the question whether, in this domain of social life, the making of law by decisions offers any advantages over the making of law by statute. In this domain the social interest, as I have said, demands the freest possible play of individual activity; *i.e.*, the freest play compatible with equally free play for all others. There must be free play, but there must also be fair play. The problem is to determine what is and what is not fair play; *i.e.*, to establish the rules of the game. And the question now under consideration is: Shall these rules be made by the umpires, — the judges, — or by the legislatures?

At bottom, it is the sense of justice, *i.e.* the ethical feeling, of the people and the time which really decides what is and what is not fair play. The rules, if they are rightly drawn, simply express this feeling. But to draw them rightly is not an easy matter. There are many relations of daily life in which every layman *feels* the principles of justice more accurately than the most skilful jurist can *express* them. In some cases the difficulty seems insurmountable, and the attempt is practically

cated in the preceding pages. Taking the data furnished by Mr. Stimson, I set myself to see whether any intelligible line of demarcation had been drawn, in our oldest states, between statute and common law. When I found such a line, it did not escape me that very much the same division had been established in the Roman empire between the imperial *leges* and the body of case law, the *jus*, — a division not obliterated by Justinian, but preserved in the digest and codex. Nor did it escape me that Savigny, in his "Vocation of our Time," drew the same line between the field of statute law and that of jurisprudence. Savigny, indeed, employed a different nomenclature to describe these two portions of the law; calling that which expresses the social or public interest the "political element" of the law, and the other portion, for reasons which will presently be indicated, the "scientific element"; but he had the same distinction in mind. I was not aware, however, until after the preceding pages had been written, that Mr. James C. Carter, of the New York bar, had not only insisted upon this distinction in our own law, but had employed the same terms, "public" and "private" law, to describe it. See his admirable essay, The Proposed Codification of our Common Law, New York, 1884. The substantial identity of his conclusions and mine has naturally strengthened my belief in the correctness of my induction. A distinction which has commended itself alike to Roman jurists of the third century and to German and American jurists of the nineteenth, is probably a valid one; and a distinction which has established itself, by a natural and unconscious adjustment, in both Roman and English law, — the only legal systems which have passed through a normal and complete evolution, — is surely a valuable one.

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abandoned. Every legal system, for example, sets up rules which determine the consequences of fraud and negligence; but no court or lawgiver has ever succeeded in fixing a definite standard of honesty or due care. In a number of the most common and most important contractual relations, the Roman prætor simply directed the *judex*, or referee, to award what was due *ex fide bonâ*, *i.e.*, according to his sense of fair play; and the most elaborate codes of modern Europe have not gone much further.[1] The Roman standard of ordinary diligence was *diligentia boni patris familiæ*, the carefulness of a substantial citizen; and the phrase has come down *verbatim* into the code Napoleon.

In a second and the most numerous class of questions, the difficulty is not insuperable; but the task is still far from light. As I have already urged, the relations of social and especially of commercial intercourse are endlessly varied in their details, — it is the very freedom of motion granted the individual in this domain that makes them so, — and it is impossible to lay down rules that will directly cover every special question. Only general rules can be posited; and the formulation of such rules is eminently the work of juristic science.[2] I have not now in mind the science of the study and the lecture room. This kind of science has done good work in discovering the general principles upon which the rules of positive law rest, in showing their organic interdependence, and in throwing the whole mass of rules into systematic form; but it is not this cloistered science that discovers and formulates the rules themselves. This is done by the science that is in constant contact with the daily life of the street and the market. It would perhaps be more accurate to call this the *art* rather than the science of law.[3] The masters of this art have always been, and always will be, the men who

[1] The proposed civil code of New York has not gone much further. In section 987 an attempt is made, in sub-sections 1–4, to enumerate the possible forms of fraud, but sub-section 5 confesses failure by adding: "Any other act fitted to deceive." And section 989 declares: "Actual fraud is always a question of fact."

[2] It is for this reason that Savigny called this portion of the law the "scientific element."

[3] So Jhering, Geist des römischen Rechts.

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pass their lives in applying the law, *i.e.*, the bench and the bar. It was this class that worked out the rules of private law in Rome, and it is this class that has made the English common law. It is customary to emphasize a distinction of method in the development of the two systems, to point out that in Rome the jurists made the law by *opinions*, and in our system the judges make it by *decisions;* but it should be remembered that the opinions of the Roman jurists on points of law were in effect decisions. In both systems the law is made by the same class, the legal profession; and in both systems it is made in the same way, by the decision of concrete cases.

It is universally conceded that the Roman jurists were masters in the art we are considering, — the art of finding rules to govern the manifold transactions and relations of individuals, — and yet, as long as the Roman jurisprudence was at its best, the work was never completed. Like our own judges, the Roman jurists found it practically impossible to give their rules final form. New cases were constantly arising that brought out new sides of familiar relations, and necessitated the revision of the rules. The Roman jurists, like the English courts, never had anything but "working" rules, subject to continual modification.

The difficulty which they experienced and which we experience — the difficulty, or rather the impossibility, of giving final form to the rules of private law — does not lie wholly in the complexity of the relations of private life. It is largely due to the fact that these relations, like all things human, are in constant flux and change, and that the law must change with the relations it governs. Whether the law be statute or case law, it must incessantly be amended. If it be statutory, it can be amended only by *enactment;* if it be case law, it may be amended by *decision.* When a case arises which shows that an existing rule of common law was originally ill formulated, or has ceased to express the existing sense of justice, it is in the power of the courts to amend the rule. They can often do this by re-examining the old cases and showing that the spirit of previous decisions justifies the amendment; that their predecessors would

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have phrased the rule differently if they could have foreseen the concrete case now presented. If they cannot amend the law in this way, they can do it by "distinction." But, say the advocates of statutory legislation, you are wronging the man who has acted in accordance with the rule laid down in the previous decisions. You are subjecting him to loss by retro-active legislation. The latter statement is perfectly true; the man *is* subjected to loss by retro-active legislation. But is he really wronged, and does he really deserve sympathy? In the case supposed, the court modifies the rule because the application of the old rule will work manifest injustice to the other party. Does not the man who invokes the old rule know this? Is he not trying to obtain an unjust advantage by means of the law?[1] Even if this be not the case, it may be a less evil occasionally to injure one man by retro-active legislation than to wrong a series of men by upholding an inequitable rule. If the former evil attaches itself to judicial legislation, the latter evil is inherent in statutory legislation. How long must an inequitable statute work injustice, and how many people must be injured by its operation, before the demand for change becomes strong enough to set the legislature in motion and secure the necessary amendment?

This, I think, is the chief advantage of judicial legislation, *viz.*, ease of amendment. Ease of amendment is desirable in a great part of the private law because constant amendment is neces-

[1] Every system of jurisprudence must see to it that no one is permitted to do fraud by means of the law — "*Ne cui dolus suus per occasionem juris civilis contra naturalem equitatem prosit.*" Digest, 44, 4, 1, § 1. This end is largely secured in our law by the "equitable powers" of the courts, as it was in Roman law by the similar powers of the prætor. But the power of our courts to amend the rules of ordinary common law works in the same direction. Mr. Carter puts the matter admirably: "The unwritten law, . . . in dealing with any novel conditions of fact which the variety of human affairs present, can address itself . . . to the simple office of applying the standard of justice to the particular case. *All men count and rely upon this.* They engage in their transactions without the aid of a professional expert, without knowing or caring to inquire what the rules of law may be, with no other guide than honest intention and ordinary prudence; but in the full confidence that the rules of law which would govern their transactions, should they ever be challenged, would be the simple dictates of justice and common sense intelligently ascertained and applied." The Proposed Codification of our Common Law, p. 37.

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sary. Constant amendment is necessary, first, because of the difficulty of formulating satisfactory rules for the endlessly varied relations of our social life, and secondly, because these relations are constantly changing. And it should be noted that when such a change occurs and a really new rule is required, the advantage of judicial (and, conversely, the disadvantage of statutory) legislation is greatly augmented. If it is hard to find the proper form for *any* rule of private law, it is especially hard to find it in the case of a *new* rule designed to meet novel conditions. A series of attempts will in any case be necessary before the desired result is obtained; before a rule is found broad enough to include all the cases that should be included, and narrow enough to exclude all those that should be excluded. If this series of experiments is judicial, the community will be forced to endure a period of legal uncertainty. If the experiments are statutory, the number of changes will not be less, the period of experiment will be much longer, and during this period the community will be subjected to a reign of positively inequitable law.

The advantage here ascribed to judicial legislation has always been recognized and emphasized by the opponents of codification, but they have chosen unfortunate terms to express it; unfortunate because ambiguous. They have praised the "flexibility" or "elasticity" of the common law. The debate has then turned on the question whether flexibility or elasticity in law is a thing to be desired; and this debate has done much to befog the public mind.

When we say that law is flexible or elastic, we may mean either of two things:

We may mean that its *rules* are so general that the courts have wide discretion in *applying* them; or,

We may mean that the rules themselves are easily modified, or amended.

Elasticity in the first of these senses is not a peculiar attribute of case law as such. It is a peculiar attribute of private law as such, because of the extreme difficulty of formulating any but general rules in this domain. It is mediately and indirectly an

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attribute of our case law, the common law, because our common law is practically restricted to the field of private law, and precisely to that part of the field of private law where the formulation of rules is most difficult. The result of this distinction is obvious. The enactment of these rules will not lessen their elasticity. The courts will have quite as free hand in applying them as before.

Elasticity or flexibility in the second sense, *i.e.*, ease of amendment, *is* a peculiar attribute of case law. This sort of flexibility is destroyed by enactment; and it is only in this sense that codification will make the private law less flexible.

The whole debate in reference to the advantages or disadvantages of elastic law has been vitiated by the failure to draw this distinction. And the issue has been further obscured by removing the discussion from its proper field, the field actually occupied by case law, and arguing the question, abstractly and at large: Is elasticity of law in general a desirable thing? It has been extremely easy to answer this question in the negative. It is not at all desirable that all parts of our law should be elastic. An elastic criminal law — elastic in either sense of the word — would be highly objectionable. Rules of criminal law formulated in so general a way as to leave great discretion to the courts would be extremely abhorrent to our sense of justice; and a system of criminal law subjected to constant modification and amendment would be hardly less so. In general, all rules based upon and intended to enforce "public policy" must be phrased with the greatest possible definiteness, construed with the greatest strictness, and changed only for great and weighty cause.

Even in the domain of private law *par excellence*, in the law which looks out for the interests of individuals, there are matters which can be and must be definitely and *specifically* regulated. An elastic law of prescription or a flexible law of bills and notes would subserve nobody's interests. These and all cognate cases resemble the law of the road; there may be no particular reason why we should keep to the right hand rather than the left, but there is an absolute need of agreement. So

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it is comparatively immaterial how long the period of prescription shall be, or what shall be the form of a valid bill of exchange; but a fixed period is indispensable in the one case, and a fixed form in the other. And such rules, once settled, should not be lightly changed, because of the confusion that will ensue.

But all this discussion is wide of the issue. We may readily admit that elasticity or flexibility is in no sense a desirable thing in those portions of the law which express public policy, or in those matters of law where it is ethically immaterial what the rule be, so there be a rule. But in a great portion of our private law, only general rules can be laid down, and great latitude must be left to the courts in their application; and this will be the case whether the rules are judge-made or statutory. The reason why this part of the law should not be made statutory is that society is perpetually assuming new forms and perpetually in need of new law, and that the new law needed in this field can be furnished more rapidly and more smoothly by the courts than by the legislatures. That the American people really feels this to be true is indicated by the practical cessation, in all our codeless states, of statutory encroachment upon this field of judicial legislation.

In the foregoing discussion I have endeavored to argue the question in the abstract, without reference to existing conditions. I have been reckoning, to some extent, with ideal quantities; *i.e.*, with factors of assumed value. I have assumed a judiciary that embodies the best talent of the legal profession, and is guided by the soundest traditions of English-American jurisprudence; legislatures that represent the best instincts of the people and proceed according to the most approved principles of political science, making only such laws as are needed, and making them carefully and methodically; and codifiers who can and will state accurately the existing rules of our law, and who are able to group them into a scientific system. I have made these assumptions because I have been trying to set forth the absolute and inherent advantages and disadvantages of the

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common law and of civil codes, of judicial and statutory legislation. In the social sciences, as in mathematics, no result of even relative truth can be obtained except by employing quantities of fixed value. If the quantities are in fact variable, the result must be corrected subsequently by taking account of the variations.

I do not propose to attempt this task. It is an ungrateful one; and the reader can do it for himself as well as I can do it for him. I think he will agree with me that the variation from the ideal standard is least in our judiciary; much less than in our legislatures. I think it a matter of notoriety that the American people is at present much better satisfied with its judges than with its legislators. The best proof of this is that the judges have been let alone, in our older states, for the last half-century. The legislators have not been let alone. Besides the encroachments of the constitution-making power which have been noticed above, and which express the determination of the people to define directly its most vital interests, there is another class of constitutional provisions which have been increasing in number with every constitutional revision, and which express profound distrust of the character and efficiency of the legislatures. What most concerns us here is the attempt to lessen the activity of these bodies. In most of the states the legislatures have been confined to biennial sessions; in thirteen states the number of days is prescribed beyond which they shall not remain in session.[1] All this means, of course, that the people wishes the least possible amount of legislation from its legislatures; and it certainly does *not* look as if the people really desired to transfer to the legislatures the duty of developing the entire private law.

I think the variation from the ideal is greatest in our codifiers. This remark is less invidious than it seems, because the kind and grade of capacity demanded are higher in the case of the codifier than in that of the ordinary legislator or the

[1] For a complete collection of the constitutional provisions indicating popular distrust of the state legislatures, see The American Commonwealth, POLITICAL SCIENCE QUARTERLY, vol. i, pp. 27 *et seq.*

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judge. The capacity of our codifiers, of course, can be determined only by their work, by the codes that have been adopted and by the codes that are proposed for adoption.

The code which has been most fully investigated is that which was prepared for New York, but which has not been adopted in this state. It has twice been passed by the legislature and vetoed by the governor; it has twice been rejected by the legislature. It is again before the legislature at this moment. Although it has not been adopted by the state for which it was prepared, it has been adopted as the civil code of California.

This code is not an accurate presentation of our common law. The testimony of the lawyers of California, who are living under it, and the testimony of the lawyers of New York, who are afraid that they may have to live under it, agree upon this point.[1] Nor is it scientifically satisfactory in its general plan or in its details. Its general arrangement is based upon that of the code Napoleon; an arrangement which is now regarded, in Europe, as antiquated and unsatisfactory. It reproduces some of the worst features of that code; particularly in its abundance of definitions and rules of interpretation.

That these matters should not be inserted in a code is now a maxim of European codification. The Austrian commissioners appointed to draft a code, in 1772, were instructed to omit everything "which does not belong in the mouth of the lawgiver, but in the lecture room."[2] The judgment of the French jurists of the present day concerning the rules of interpretation (of contracts and testaments) and concerning the definitions of the code Napoleon, has been energetically expressed by M. Huc, professor of the code in the law faculty of Toulouse. He stigmatizes them as "senseless rules (*dispositions banales*), which are use-

[1] See among numerous other publications: J. N. Pomeroy (Professor of Municipal Law in the University of California), The Civil Code in California, in the *West Coast Reporter*, vols. iii and iv, reprinted by the New York City Bar Association, 1885; James C. Carter, The Proposed Codification of our Common Law, 1884; The Annual Reports of the Special Committee of the New York City Bar Association, 1881–85, particularly the Fourth Annual Report, 1884. See also Sheldon Amos, An English Code, pp. 99–107, where the New York code is unsparingly condemned.

[2] Behrend, Die neueren Privatrechts-Kodifikationen, S. 370, Anm.; Unger, Oesterreichisches Privatrecht, S. 7.

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less when they are not dangerous, and which, in any case, belong exclusively in the domain of jurisprudence [*la doctrine*] and not in that of the legislator." [1]

The New York codifiers have not only reproduced these "useless if not dangerous" provisions of the code Napoleon; they have outdone the French codifiers by reproducing, in their "maxims," Justinian's *regulae juris*, that title of the Digest which, as all students of mediæval jurisprudence are aware, did more than anything else to confuse the law and make its application uncertain.

But these mistakes are venial in comparison with the great error of trying to force our law into the mould and form of a foreign system; because this cannot be done without modifying its spirit and substance. It seems that other codifiers besides those of New York have committed this error; for Mr. Stimson finds "civil" (*i.e.*, European) law in all our private law codes. This ought to set us thinking. Why do all our codifiers go to France to find a scientific system? Is it not because they are unable to find it at home?

When it was proposed, in 1815, that a civil code should forthwith be constructed for Germany, Savigny objected that German legal science was not sufficiently developed to warrant the undertaking. To-day every German jurist admits that Savigny was right.

In the introduction to this article (page 105), I indicated that there were two distinct questions to be answered. I have discussed the first only, *viz.*, the probable effect of codification upon the codifying state. The second, and, in my opinion, the more important question, *viz.*, the effect of the general adoption of state codes upon the general development of American law, will form the subject of a second paper.

MUNROE SMITH.

[1] Le Code civil italien et le Code Napoléon. 2me éd., Paris, 1868, t. i, p. 14.

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THE HUDSON'S BAY HALF-BREEDS AND LOUIS RIEL'S REBELLIONS.

THE trend of political events in the Dominion of Canada during the year 1886 seems to indicate that the Conservative administration of Sir John A. MacDonald is drawing to a close. The legislative elections in the several provinces showed overwhelming Liberal and Reform gains and disastrous Conservative losses. At present the legislatures of Ontario, Quebec, New Brunswick, and Nova Scotia, the four most populous and important provinces, have Liberal and Reform majorities, while the Conservatives have control of only the three least important provinces — Prince Edward's Island, Manitoba, and British Columbia.

The most significant result of the year was the election in Ontario. Sir John MacDonald fully realized the close bearing of this preliminary battle upon the final engagement which was to follow in the general election for the next Dominion Parliament.[1] As soon as the premier of Ontario, Hon. Oliver Mowat, ordered new elections, the shrewd premier of the Dominion, together with four of his cabinet officers and the leaders of the Ontario Conservatives, took the stump, and for two months waged one of the bitterest political strifes ever known in Canada. The Ontario election took place December 28, 1886, and resulted in a crushing defeat of the Conservatives.

Through all this fierce struggle the fate of Louis Riel, the leader of the Half-breeds in their political disturbances, was made to play an important part. To rouse the Orangemen of British descent to the support of the Conservatives, Riel the Roman Catholic, Riel the French Canadian, was execrated as a traitor; to rally the Catholic French Canadians to the standard of the Reformers, Riel was lauded as a patriot and martyr.

[1] [The general election was held February 22, 1887. The Conservatives, as was anticipated, sustained severe losses; but, as the QUARTERLY goes to press, the indications are that they retain for the present a working majority. — ED.]

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The animosity awakened by these appeals to race and religious prejudices drove more than one hundred thousand French Catholics over to the Reform ranks, and left the Orangemen of the Conservative camp deeply embittered. In this struggle the young Canadian nation received a terrible wound. The development of a national feeling, a sentiment of Canadian nationality, is not merely retarded by embroiling the British Orangemen with the French Catholics; it is hopelessly blocked as long as unscrupulous politicians can expect to obtain immediate advantage by fanning the flames of ethnic and confessional hate. Louis Riel, the leader of the rebellions of the Half-breeds in the Northwest Territories, has thus become an important figure in Canadian political history.

I. *The Hudson's Bay Territory and its Inhabitants.*

In order clearly to understand the causes which led to these rebellions, it will be necessary to describe briefly the origin and history of the Half-breeds of the Hudson's Bay Territory. To do this, we must go back to the time when the vast interior, west of Hudson's Bay, was explored and settled by rival French and English peltry traders; the former pushing northwest from the banks of the St. Lawrence, and the latter westward from the shores of Hudson's Bay.

The title to newly discovered territory rested, by the legal theory of the time, upon prior discovery; but in practice, as the history of the Hudson's Bay Territory shows, the right by actual occupancy commonly prevailed. The right of prior discovery was undoubtedly on the side of the English. After the early Scandinavians, the first Europeans who visited the continent north of the St. Lawrence were John Cabot and his son Sebastian, who, under commission of Henry VII of England, discovered Newfoundland as early as 1497. Cabot, in accordance with his duty under his commission, set up the standard of the crown of England and proclaimed his king's sovereignty over all lands and peoples he discovered. The voyage of the Cabots was followed by other expeditions under English aus-

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pices.[1] Chief among these were three voyages by Sir Martin Frobisher, in the years 1576, 1577, and 1578; the same number by Master John Davis, 1585, 1586, and 1587; one by Captain George Waymouth, 1602; and another by Master Henry Hudson, 1610, on which he discovered that great inland sea which bears his name, the vast watershed of which comprises the territory now under discussion. Other expeditions followed in close succession, and in 1670 Charles II granted a charter to his cousin Prince Rupert and seventeen others, noblemen and gentlemen of England, incorporating them into the association which afterwards became known as the Hudson's Bay Company.

The charter of this company vested governmental as well as property rights in the corporation. It was entirely within his royal prerogative for Charles II to issue this charter, and its validity has been recognized at various times by treaties, statutes of Parliament, and royal licenses.[2] The charter granted to the company all the territory watered by the streams that flow into Hudson's Bay, the bay itself and all waters leading thereto, in free and common socage in perpetuity, conditioned on the payment of two elks and two black beavers whenever the king or his heirs should visit the domain. The instrument expressly conferred upon the company plenary governmental powers over the whole extent of its vast possessions.[3] It was given legislative power, being authorized to make laws, constitutions, orders, and ordinances in such form as may be best for good government, and to lawfully impose, ordain, limit, and provide such pains, penalties, and punishments upon all offenders against the laws as may be expedient, except, however, the laws and penalties must conform as near as possible to the laws, statutes, and customs of England. The executive authority was vested in a governor, deputy governor, and other deputies (to be appointed by the governor), and a committee of seven elected by the stock-

[1] Thomas Rundall, Voyages towards the North-West, 1496 to 1631, Hakluyt Society Publications.

[2] R. M. Martin, Hudson's Bay Territories and their Chartered Rights, p. 45.

[3] *Ibid.*, Appendix.

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holders. The appointment of the judiciary was left entirely to the governor. The guaranties of civil liberty were few. The laws of the company, as we have seen, were required to agree as nearly as possible with the common law of England, and appeal was permitted to the home government. But all subjects were forbidden to enter or visit the territory without a license from the company; and representation in the company was on the basis of the amount of stock held, £100 interest giving the holder one vote.

The prime object for which the king originally granted the charter was the prosecution of discovery and colonization; but the company, far from carrying out the sovereign's intention, sought only to enrich itself by peltry trade with the Indians. For many years it confined its attention to the establishment of trading posts upon the shores of Hudson's Bay.

In the meantime, Breton fishermen, in 1504; John Verrazani, 1524–5; Jacques Cartier, 1535–40; Samuel de Champlaine, 1603–1635;[1] and others, sailing under the French flag, had discovered and explored the St. Lawrence River and planted numerous colonies along its banks. The Company of New France, chartered by Louis XIII in 1627, and afterwards the West India Company, created by Louis XIV in 1663, penetrated northward from the St. Lawrence far into the heart of the continent, and there established numerous trading posts.[2] In this way, many interior localities of the vast region of Hudson's Bay were explored and settled by the French prior to the arrival of the English. The rival traders no sooner met than they began hostilities. Each company claimed exclusive right to trade with the Indians under charters from their respective sovereigns, who in turn claimed sovereignty over those territories by right of prior discovery. The envious traders became involved in constant conflicts, which were kept up with more or less hostility until, by the treaty of Utrecht, in 1713, France

[1] Charlevoix, History of New France (Shea), vols. i and ii. Ferland, Cours d'Histoire, vol. i, p. 222.

[2] New York Colonial Documents, vol. ix, p. 40.

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surrendered to England forever all claim to the Hudson's Bay Territory.[1]

The Hudson's Bay Company confined its energies so exclusively to the prosecution of the peltry trade that further discoveries and actual colonization were entirely neglected. In 1749, it was attacked by envious rivals at home, who brought a plea to have the charter annulled for *non-user;* and the company, in defence, was able to show only that it had four or five trading posts, employing about one hundred and twenty servants, in all its vast domain; and these stations were confined to the shores of the bay.[2] The company was not fully aroused to the importance of making actual settlement in the territory west of the bay until a formidable rival, the Northwest Fur Company of Montreal, came into the field of competition.[3] This company was organized at Montreal by Scotchmen in 1783. By adopting the co-operative system of giving its employees a share in the profits of the business, it greatly strengthened its internal organization, and rapidly established its trading posts far and wide throughout the unexplored region of the Northwest Territories. The Hudson's Bay Company attempted to drive out the intruders; but these held fast to their settlements on the ground of actual discovery and occupancy. These conflicting claims often led to sanguinary encounters. The Indians and the *Métis*, as the offspring of French and Indian amalgamations are called, were attracted to the rival traders by the liberal use of whiskey, and were encouraged to rob and murder the agents of the competing corporations. By these means they were, of course, completely demoralized, and learned thoroughly the lesson of lawlessness. This state of things continued until the trading posts became nothing more than armed camps. Colonization was out of the question.

In 1811, Thomas Douglass, fifth earl of Selkirk, who had already, in 1803, sent over a thousand needy Highlanders to

[1] Statutes, Papers, Documents, *etc.*, respecting Boundaries of Ontario [Canadian Public Documents], p. 15.

[2] Encyclopædia Britannica, vol. xii, p. 333.

[3] G. Mercer Adam, The North-West, pp. 26 *et seq.*

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Prince Edward's Island, determined to plant a genuine colony somewhere in the Hudson's Bay Territory. He resolved to bring to bear all the influence of his position and great wealth to carry out this scheme. Accordingly, he purchased from the company (one-fourth of whose capital stock his family owned) that large tract of territory, comprising 154,411 square miles, which afterwards became the province of Manitoba, and sent upwards of one hundred Highlanders, with Captain Miles McDonald as their governor, to a point on the Red River near the confluence with the Assiniboine.[1]

The rival companies were strongly opposed to the establishment of this colony. It was too civilized to suit their purposes, and they at once determined to destroy it. Nevertheless, it survived their ill will for a time. It continued to grow for two years. Then the agents of the two companies endeavored to stir up sedition within the colony, and encouraged the Indians and Métis to rob, outrage, and murder the colonists. Earl Selkirk, learning of these crimes against his people, had himself appointed a magistrate, and set out for the scene of rapine with a disbanded corps of Swiss soldiers, who had been released from service at the close of the war of 1812.[2] On his way thither he met his governor, McDonald, returning from the scene of the ill-fated colony with the news of its utter destruction. Its inhabitants had been massacred by Indians and Half-breeds, instigated to the act by the companies' agents. In spite of these tidings, the earl pursued his way to his territory, and after spending many months struggling with suborned judges and juries and the hirelings of the great corporations, he withdrew from the country without righting a single wrong. His high social standing, the integrity of his purpose, his vast wealth and great political influence had availed him nothing against the power of the monster monopolies. The Indians and Half-breeds who had been incited by one set of white men to plunder and murder another set, in order to prevent the latter from cultivating the soil, had in the meantime made great advance in their education toward lawlessness and barbarism.

[1] G. Mercer Adam, North-West, pp. 101 *et seq.* [2] *Ibid.*, p. 107.

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Not long after this combination against the Red River Colony, the two corporations amalgamated, and continued their operations, from 1821 to 1859, under the charter of the Hudson's Bay Company. In complete violation of its charter duties, this great company continued to discourage actual colonization, employing its exclusive privileges simply to retain its monopoly of the peltry trade, and to increase its great dividends.

The Half-breeds, or Métis, who were already quite numerous, were increasing in number every year. This was due largely to the policy of the company. It continued to keep the country tolerably free from independent white settlers by making existence intolerable for all whites who were not in the company's employ; and an employee who came to the territory with a white wife *was never promoted*.[1]

The object of the company in thus abetting the mixture of European and Indian blood was to bring into existence a race sufficiently endowed with savage instincts to be skilful hunters and trappers of fur-bearing animals, and at the same time possess enough intellectual ability to serve as go-betweens in the company's trade with the full-blooded Indians.

The establishments of the company were not colonies in any proper sense of the word; actual colonization was discouraged. They were merely armed forts, adapted to the peltry trade and for protection against the attacks of savages. An article written by a former employee contains the following statements:

> In 1860, the company owned one hundred and fifty trading posts in charge of twenty-five chief factors, twenty-eight chief traders, with one hundred and fifty clerks and twelve other servants. The trading districts of the company were thirty-eight in number, divided into five departments and extending over a country nearly as large as Europe, though thinly peopled by some 160,000 natives, — Esquimaux, Indians, and Half-breeds.[2]

This great corporation levied taxes and collected customs, but built no public roads, improved no water-ways, and did nothing

[1] G. Mercer Adam, North-West, p. 30.

[2] The Story of a Dead Monopoly, *Cornhill Magazine*, August, 1870.

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to ameliorate the condition of the settlers. To the immigrants who came into the country in spite of the sufferings they were made to endure, and who fulfilled the hard conditions imposed upon the acquisition of land, it neglected to give the titles they had earned. It placed embargo upon all trade with the Indians on the part of the settlers; it sent its agents to search the houses of the settlers for furs, confiscated all that was found, and took the inhabitants prisoners. In fact, everything was done to prevent immigration and to harass those who had the hardihood to come into the territory against the company's will.

In 1855, the colony on the Red River, which had been revived, numbered upwards of 7000 souls. There were 800 dwelling-houses, and 7000 acres of land under cultivation.[1] The colonists sent a petition to the Imperial Parliament, setting forth their grievances. I quote a portion:

> The Council called into existence by the Hudson's Bay Company imposes taxes, creates offenses, and punishes the same by fines and imprisonment; *i.e.*, the Governor and Council make the laws, judge the laws, and execute their own sentence. We have no voice in their selection, neither have we any constitutional means of controlling their action. Under this system our energies are paralyzed, and discontent is increasing to such a degree that events fatal to British interests, and particularly to the interests of Canada, and even to civilization and humanity, may soon take place.[2]

Complaints of these oppressions became so frequent and urgent, that Parliament, in 1857, appointed a select committee to investigate and report upon the charges of maladministration by the company. The committee made a thorough examination of the subject, and rendered an exhaustive report, in which they recommended that the charter of the company be not renewed upon its expiration in 1859.[3]

In 1867, nine years after the expiration of the company's charter, the Imperial Parliament erected the provinces of Ontario, Quebec, Nova Scotia, and New Brunswick into a confederation called the Dominion of Canada.[4]

[1] G. Mercer Adam, The North-West, p. 186. [2] *Ibid.*, p. 189.
[3] Encyclopædia Britannica, p. 333.
[4] English Statutes at Large, 30 Vict. c. 3.

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The same year the Dominion Parliament addressed a request to the Imperial Parliament to annex to the Dominion the Hudson's Bay Territories, and to give the Dominion government political authority over them. The next year, in accordance with this petition, the Imperial Parliament passed the Rupert's Land Act, which provided for the surrender by the Hudson's Bay Company of all their lands and jurisdiction therein to England, and the transfer of the same to the Canadian government.[1] The following year, the Canadian government sent the late Sir George E. Cartier and the Hon. William McDougall to London, to arrange the terms and details of the transfer. The terms agreed to were in brief as follows: In consideration of £300,000 the company stipulated to surrender to the Dominion all its political rights over its vast domains, and to transfer its title to all the soil, except the sites of its trading posts and the adjoining blocks, and one-twentieth of that great region known as the "fertile belt." The legal aspect of this surrender and transfer was so obscure to me, and the sources of information at my command threw so little light upon the matter, that I applied to Mr. McDougall for enlightenment. I am glad to be able to give his courteous and exceedingly lucid reply, in which he briefly explains the legal steps in the case.

OTTAWA, March 26, 1886.

MY DEAR SIR, — In reply to yours of the 23d instant, I have to inform you that the Hudson's Bay Company's charter was not limited as to time. Their license to trade over the "Indian territories" — which, by the judgment of the judicial committee of the Privy Council in the Ontario boundary case, may be said to include all the country west of Lake Winnipeg — expired in 1859.

The Hudson's Bay Company surrendered their territorial and municipal or government rights to the Crown by deed, dated November 19, 1869. The surrender was accepted by her Majesty by an instrument under her sign manual and signet, dated June 22, 1870.

The whole country, under the name of Rupert's Land and the North-Western Territory, was admitted into and became part of the Dominion

[1] English Statutes at Large, 31 & 32 Vict. c. 105.

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of Canada upon certain terms and conditions set forth in an order in Council (Imperial), dated June 23, 1870.

All these transactions were authorized by acts of the Imperial and Dominion Parliaments. The right of soil or proprietorship in Rupert's Land, the limits of which were never defined, and the powers of government, also of doubtful legality, remained in force under the charter until the date of the surrender. By the transfer to the Dominion, the whole territory they claimed in British North America (whether covered by charter or not) became part of Canada, and is now subject to the legislative control of the Canadian Parliament. I may add that the company's rights and powers as a civil government were regulated and in some respects qualified by various acts of the Imperial Parliament, notably by 43 Geo. III, cap. 138, and 1 and 2 Geo. IV, cap. 66. The theory of the British constitutional system is that the power of the Imperial Parliament is supreme in all colonies, or possessions beyond sea, and all existing colonial governments may be restrained, modified, or extinguished at will. The same rule extends to colonial courts. The judicial committee of the Privy Council, on appeal, may overrule or vary the judgments of all colonial courts.

Very respectfully yours,

WM. MCDOUGALL.

In the manner set forth in this letter, the Dominion of Canada came into possession of, and jurisdiction over, two and a half million square miles of territory, with a population of upwards of 175,000 whites, Indians, Half-breeds, and Esquimaux.[1]

Before the queen had issued an order in council, admitting the territory into the Dominion, the Canadian Parliament passed an act[2] constituting a provisional government for that part of the domain which the earl of Selkirk once owned and afterwards retransferred to the company, and which is now known as Manitoba. Mr. McDougall, who influenced the Dominion government more than any other person to acquire the new domains, was put at the head of the provisional government and sent to the territory with particular instructions to organize it and have it ready for erection into a province of the Dominion as soon as the queen's order in council, annexing the territory

[1] Story of a Dead Monopoly.

[2] Dominion Statutes, 32 & 33 Vict. c. 3.

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to Canada, should be issued.[1] The inhabitants of the new country, not having been consulted, thought this a high-handed performance on the part of the Dominion. They began to fear that in making their escape from the clutches of the greedy monopolists, they had fallen into the snare of the despoiling politician. The government surveyors had already begun their surveys according to the meridian line system at all the settlements, preparatory to allotting the blocks which were retained by the Hudson's Bay Company under their agreement with the Dominion. This system ignored the natural farm plan and water frontage arrangement, according to which the Half-breed settlers had originally acquired possession, and thereby greatly impaired the value of their farms.[2] The Métis accordingly protested; but no attention was paid to their protests, and they became alarmed and angered. At this point, the notorious leader of the Canadian Half-breeds steps upon the scene —Louis Riel.

II. *Louis Riel and the Red River Rebellion.*

This unfortunate man was born in 1844, near Fort Garry in the Northwest Territories.[3] Although his father was a white man, and he had but a slight admixture of Indian blood through his mother, he identified himself so conspicuously with the Half-breeds that he was generally thought to be one of them. From childhood he displayed a morose disposition. The subject of religion engaged his deepest interest at an early age; and when he became sufficiently mature he entered a Roman Catholic school at Montreal, as the *protégé* of Archbishop Taché, with the intention and expectation of becoming a priest. At this school he received an ordinary collegiate education, but for some reason was not allowed to enter the priesthood. During his school life he developed the peculiarities of character which afterwards led to his notoriety. He continually gave

[1] Canadian House of Commons Debates, Fourth Session: Execution of Louis Riel.
[2] Major C. A. Boulton, North-West Rebellions, p. 53.
[3] Gibbet of Regina, p. 175.

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expression to visionary views upon religious and political reforms, announced his opinions in a self-satisfied and dictatorial manner, and became very irascible when opposed. When engaged in discussing any of his pet theories, he commanded a rapid flow of language. He sought always to impress his hearers with a sense of his importance. He exhibited merely average ability, and was intensely vain and mercenary in disposition. Although he was very violent in speech, he became completely cowed at the approach of immediate physical danger. Shortly after leaving the theological seminary, he wandered back to the neighborhood of his birth, in the great Northwest. When that region was transferred to the Canadian government he had settled at Red River, and was already well known in the community by reason of his utopian political views and peculiar religious opinions.[1]

Upon the passage of the Canadian act of 1869, establishing a provisional government for the colony at Red River, Riel hurried among the ignorant Half-breeds and by his ready speech and high-sounding doctrines of religion and politics soon aroused them to prepare for resistance to the Canadian authorities. His task was an easy one. The Half-breeds are naturally fond of excitement and averse to peaceful pursuits; they had been well schooled, as we have seen already, in lessons of sedition, rapine, and violence; and they had good reason to believe that the new Dominion government was but a new invention of the white man to defraud the Half-breed of his property. Riel began this, his first rebellion, by collecting a body of Half-breeds and ordering the government surveyors under Colonel Dennis to stop operations. Soon afterward he seized Fort Garry, which contained the Hudson's Bay Company's military supplies and 390 Enfield rifles.[2] He then called a "National Convention," to which all inhabitants were invited, and influenced the convention to adopt the following "Bill of Rights":[3]

[1] *The New York World*, November 17, 1885.

[2] Major C. A. Boulton, Reminiscences of the North-West Rebellions, p. 65.

[3] Chas. Pelham Mulvaney, History of the North-West Rebellion of 1885, footnote, p. 27.

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1. The right to elect our own Legislature.

2. The Legislature to have power to pass all laws local to the Territory over the veto of the Executive by a two-thirds vote.

3. No act of the Dominion Parliament (local to the Territory) to be binding on the people until sanctioned by their representatives.

4. All sheriffs, magistrates, constables, *etc.*, *etc.*, to be elected by the people.

5. A portion of the public lands to be appropriated to the benefit of schools, the building of roads, bridges, and parish buildings.

6. A guarantee to connect Winnipeg by rail with the nearest line of railroad, the land grant for such road or roads to be subject to the Legislature of the Territory.

7. For four years the public expense of the Territory, civil, military, and municipal, to be paid out of the Dominion Treasury.

8. The military to be composed of the people now existing in the Territory.

9. The French and English languages to be common in the Legislature and Council, and all public documents and acts of the Legislature to be published in both languages.

10. That the Judge of the Superior Court speak French and English.

11. Treaties to be concluded and ratified between the Government and several tribes of Indians of this Territory, calculated to insure peace in the future.

12. That all privileges, customs, and usages, existing at the time of the transfer be respected.

13. That these rights be guaranteed by Mr. McDougall before he be admitted into this Territory.

14. If he have not the power himself to grant them, he must get an Act of Parliament passed expressly, securing us these rights; and until such act be obtained, he must stay outside the Territory.

15. That we have a full and fair representation in the Dominion Government.

Before the convention adjourned, Riel induced it to constitute a provisional government, with himself at the head. In the meantime, as secretary of the provisional government that assumed power at the beginning of the outbreak, he had notified Mr. McDougall not to enter the territory. Mr. McDougall was compelled to obey the command of the insurrectionists, because he had neither the legal authority nor the military force to do otherwise. The Dominion government

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now withheld the price they had promised to pay the Hudson's Bay Company for the territories, on the ground that the company was not able to turn them over to the Canadian government.[1] The company was not prepared to quell such an outbreak, and Riel was consequently left master of the situation, and for six months held despotic sway over all the territory.

At the outset, Riel had the support of nearly all the settlers; but his ambition to form an independent republic with himself at its head, rather than agitate for the recognition of the principles set forth in the bill of rights, became plain to all observers and disaffected nearly all the white population. His acts of petty spite and cruel tyranny to those who broke with him became more and more oppressive, until, at length, he went so far as to order the shooting of a young Orangeman, Thomas Scott, against whom he had a personal grudge. This aroused the Orangemen of Upper Canada; and public opinion ran so high that the English government was called upon to interfere. The colonial and home governments entered into an arrangement, under which a strong military force, commanded by Colonel Wolseley, — now Lord Wolseley, the hero of Tel-el-Kebir, — was sent to quell the rebellion, and place the Canadian authorities in control.

In the meantime, and before tidings of Scott's murder had reached Ottawa, Archbishop Taché, passing through that city on his return from the Œcumenical Council at Rome, had been commissioned by the governor-general to make a settlement of the difficulties in the Northwest. He received discretionary power to grant amnesty to the rebels.[2] As it was more than four hundred miles over icy mountains and trackless, snow-clad prairies, to the nearest telegraph wire, it was impossible for the archbishop to communicate with the Dominion government as to the state of affairs he found there, or to receive instruction on the basis of reports which the government had received in the meantime. It seemed wise

[1] Hon. Wm. McDougall, Red River Rebellion, pp. 17–27.

[2] Major C. A. Boulton, Reminiscences of The North-West Rebellions, p. 135.

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to the archbishop to extend general amnesty and to include therein his former *protégé* Riel, notwithstanding the cruel murder of young Scott. Delegates from the territory were at once despatched to Ottawa to arrange a peaceful adjustment of the territorial troubles. The matter was settled by passing an act erecting the territory into a province of equal grade with other Canadian provinces, to be known as Manitoba.[1] But Colonel Wolseley and his military force were sent to the territory to see that the new *régime* was effectually installed and that all rebels were properly dealt with. Riel found it expedient to abdicate and go into temporary exile at the approach of Wolseley, and no opposition was offered to the establishment of the new government for Manitoba.

Question now arose as to the legality of the amnesty granted by Archbishop Taché. It was urged that the territory, at the time the amnesty was granted, was not actually acquired by the Dominion. The Orangemen demanded of the Canadian government that Riel's blood be shed in expiation for Scott's; but the Roman Catholics stood by their bishop who had pardoned Riel, and the French upheld their countryman's cause.[2] The government was placed between two fires. Finally, the matter was compromised; the government gave Riel $4000 to leave the country.[3] In 1873 Riel was elected to the House of Commons from Ottawa, but was promptly expelled from the House. In October of the same year a warrant of outlawry was issued against Riel by the Court of Queen's Bench of Manitoba. Amnesty was then granted to Riel and his lieutenant, Lepine, on condition of five years' banishment and forfeiture of political rights.

The next five years Riel wandered about Canada and the United States, spending the money he had obtained by the bargain made, through Archbishop Taché, with the Canadian premier. Part of the time he was confined — it seems on his own application — in no less than three different insane asy-

[1] Act of the Dominion Parliament, 33 Vict. c. 3.
[2] Hon. Wm. McDougall, Eight Letters on the Red River Rebellion.
[3] Major C. A. Boulton, Reminiscences of the North-West Rebellions, p. 150.

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lums:[1] *viz.*, 1874, Longue Pointe; 1876, at Montreal; and 1879, at Washington, D. C., U. S. A. Finally he settled down as a school teacher at Sun River, Montana, and in due time became an American citizen.[2]

It cannot be justly said in Riel's behalf, that he obtained for Manitoba its constitution and erection into a province; for the Canadian provisional government, which he prevented for a time from entering the territory, was sent there for the express purpose of organizing that territory as a province. But it is undoubtedly true that he forced the government to make the liberal land grant of two hundred and forty acres to each child and one hundred and sixty acres to each head of a family, besides issuing to the inhabitants patents for the farms of which they were in actual occupation. The Métis of Manitoba have ever since attributed to Louis Riel the security of their political and property rights; and to-day they even ascribe to him the advancement and present importance of their province in the Dominion of Canada.

III. *The Saskatchewan Valley Rebellion.*

When the Métis of the great Saskatchewan valley began to understand the concessions that were made to the successful Red River insurgents, they endeavored to have the same recognition accorded their claims to property in the soil; but the population being sparse and its political significance very small, the government seems not to have considered it worth while to pay any attention to its demands. As time wore on, the grievances of the Métis became more and more unbearable; and at length, their petitions having proved fruitless, they determined to resort to more energetic measures. They agreed with one accord that Louis Riel was the man to wrest from the government the recognition of their rights, and in 1884 they sent a delegation of Half-breeds to Montana to invoke his assistance.[3]

[1] The Queen *vs.* Louis Riel [Can. Pub. Docs. 1885], p. 203.
[2] Sir Alexander Campbell, Report of Case of Louis Riel [Can. Pub. Doc.], p. 6.
[3] Major C. A. Boulton, Reminiscences of the North-West Rebellions, p. 169.

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The Saskatchewan valley, the scene of the Half-breed rebellion of 1885, lies northwest of Manitoba, where men of the same blood revolted in 1869. The valley is about eight hundred miles long by four hundred broad. Its soil is fertile, and its population numbers sixty thousand souls, of whom thirty thousand are Indians; ten thousand, whites of pure European blood; and twenty thousand, the offspring of French and Indian or Scotch and Indian amalgamations.[1] The Indians, for the most part, roam over their vast reserves in pristine savagery; a few tribes only have settled in small trading and farming districts. The whites are gathered in large towns, or scattered throughout the region as traders and farmers; some of them are mere adventurers and land speculators, seeking opportunity to swindle the improvident Half-breed out of his birthright. The Half-breeds are largely hunters and trappers; but some of them, becoming farmers, have settled in villages of four or five hundred souls along the banks of the Saskatchewan.[2] These settlers laid out their farms fronting on the river, and running back two or three miles into the prairie. The land near the river is more fertile, and the water frontage is advantageous for watering cattle, for fishing, and for communication with hunting and fishing grounds and with the market.

The grievances which the people claimed they were suffering at the hands of the Dominion government were in part political and in part economic. While the whites felt more keenly the lack of political rights, the Indians and Half-breeds were more incensed by the alleged economic wrongs.

The first great cause of trouble was the system of government surveys. The Canadian government continued in the Saskatchewan valley the survey according to the American block system, which had been introduced in Manitoba. The object was to connect the whole territory by base and meridian lines from east to west and from north to south, and thus to lay the foun-

[1] The data upon which this estimate is based are drawn from Rand McNally & Co.'s Atlas of the World, p. 306; American Cyclopedia, vol. ix, p. 330; Statesman's Year Book, 1886, p. 566; and Almanach de Gotha, 1886, p. 801.

[2] Major C. A. Boulton, Reminiscences of the North-West Rebellions, p. 162.

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dation for future surveys. By this system, townships six miles square are laid out and then subdivided into sections one mile square, separated by road allowances one and one-half chains wide.[1] This plan of survey cut up the existing farms, and in many instances deprived them of their water frontage. This seemed to the Half-breeds a wilful depreciation of their property. But the government did not feel justified in discontinuing its system of surveying, because the ignorant Half-breeds were unable to comprehend its scientific and practical value.

Another grievance of the Half-breeds was that the government neglected to give them patents to their holdings, and scrip entitling them to proportional shares of land such as their kinsmen had received in Manitoba.[2] A patent is an instrument from the government vesting title in the actual occupant of a parcel of land. Scrip gives the head of a family the right either to locate one hundred and sixty acres of land, or to purchase one hundred and sixty dollars' worth of land from the Dominion. In case of children not heads of families, the amount is two hundred and forty acres or two hundred and forty dollars in scrip. The government had observed that about ninety per cent of the Half-breeds of Manitoba had elected to take scrip in place of patents, and had sold it for thirty-five cents on the dollar to land speculators, who held the land in barrenness until the cultivation of neighboring property increased its value. Moreover, a great number of the Half-breeds of the Saskatchewan had already obtained their scrip in Manitoba. It was because of these circumstances, and upon the recommendation of those who had the interest of the Half-breeds at heart,[3] that the government refrained from giving scrip to the Half-breeds of the Saskatchewan.

Another complaint was that the Half-breeds could not acquire a second homestead, as the white settlers were doing. The government did not admit the existence of any such grievance. The Half-breeds had the same privilege of acquiring two home-

[1] Major C. A. Boulton, Reminiscences of the North-West Rebellions, p. 163.
[2] G. Mercer Adam, The North-West, p. 240.
[3] Major C. A. Boulton, Reminiscences of the North-West Rebellions, p. 165.

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steads, but, as a matter of fact, they would not fulfil the requirements. The law provided that any settler could locate one hundred and sixty acres of land; and by living six months of the year, for three successive years, upon the land, building a house and stable and cultivating a certain portion of the soil, he might obtain a government patent to the farm. After acquiring one homestead, he was entitled to acquire one other in the same manner.[1]

The greatest grievance of the Half-breeds was the way in which their petitions were treated. They were persistently pigeon-holed by the government.[2] It is claimed for the Half-breeds that seventy-eight petitions setting forth their complaints had been sent to Ottawa, and that all of them were substantially ignored.

The suppression of these petitions was an inexcusable wrong. It went far to justify the sort of agitation which would be felt at Ottawa. I do not mean to say that I justify entirely the armed resistance of the Half-breeds to the constitutional authorities in the Northwest; and I certainly do not mean to defend Riel's personal conduct in the affair. I wish simply to say that the right to petition for a redress of grievances is an ancient and precious right of English subjects, and that the Canadian government, in pigeon-holing the complaints of the Half-breeds, abridged that right in a most exasperating manner. The government has offered no excuse for this wrong. Information on the subject has been persistently demanded by the opposition in the Dominion Parliament, but it has been stubbornly refused.

Riel returned with the Half-breed delegates to the Saskatchewan, and immediately began agitating. He found no difficulty in stirring up the Half-breeds; they had themselves taken the initiative in sending for him. And he found the rest of the population ripe for disturbance. The Indians were rendered desperate by the prospect of famine; the big game upon which they lived was rapidly disappearing from the forests.[3]

[1] Major C. A. Boulton, Reminiscences of the North-West Rebellions, p. 174.
[2] Gibbet of Regina, p. 73. [3] G. Mercer Adam, The North-West, p. 229.

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The land speculators were angered against the government; they had lost by the change in the route of the Canadian Pacific Railroad.[1] The farmers generally were in a bad humor on account of great losses in crops during the preceding year.

Riel began his second rebellion as he had begun his first, by issuing a "Bill of Rights." As long as he used constitutional methods, he had the support of many white settlers; but as soon as he showed that he meant to stir up rebellion and involve the government in heavy losses to quell the outbreak, and great expense to buy him off, they withdrew their support. Riel spent the winter in spreading the doctrines of his "Bill of Rights." When he had secured a sufficient number of adherents, he formed a provisional government. The following is the "Bill of Rights" which formed the text of Louis Riel's second agitation in the Northwest Territories:

1. The subdivision into provinces of the Northwest Territories.
2. The Half-breeds to receive the same grants and other advantages as the Manitoba Half-breeds.
3. Patents to be issued at once to the colonists in possession.
4. The sale of half a million acres of Dominion lands; the proceeds to be applied to the establishment in the Half-breed settlement of schools and hospitals and such like institutions, and to the equipment of the poorer Half-breeds with seed, grain, and implements.
5. The reservation of a limited township of swamp-land for distribution among the children of Half-breeds during the next one hundred and twenty years.
6. A grant of at least one thousand dollars for the maintenance of an institution to be conducted by the men in each Half-breed settlement.
7. Better provision for the support of the Indians.[2]

As soon as the government understood Riel's operations, they appointed a land commission to allot scrip to those entitled to it. Riel saw that if this commission were permitted to perform its task, he would lose the chance of bargaining with the government a second time for peace on a cash basis. It was

[1] G. Mercer Adam, The North-West, p. 231.
[2] Charles W. Mulvaney, History of North-West Rebellion, p. 27.

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necessary for him to anticipate the commission, precipitate an outbreak, and hold possession of the territory by force. On the 26th of March, 1885, soon after forming his provisional government, Riel gathered about two hundred followers, — Half-breeds, Indians, notorious plain-hunters, and other malcontents, — crossed the river at Batoche, looted the stores at St. Laurent, and took three government employees prisoners.[1] He then sent the band, under the command of his lieutenant, Gabriel Dumont, to intercept a company of mounted police and teamsters, under command of Major Crozier, on their way from Fort Carlton to Duck Lake, whence they intended to remove some government stores. The two parties met four miles from Duck Lake. During a parley, a scuffle arose; Major Crozier ordered his men to fire, which they did, and the Half-breeds promptly returned the fire, killing some twenty of the major's force. Thus began the second rebellion in the Northwest. It was not suppressed until upwards of two thousand volunteers had invaded the territory, under command of Major-General Frederick Middleton, and four engagements had taken place, in which forty soldiers lost their lives and one hundred and ten were wounded. The suppression of the rebellion cost the Dominion government five million dollars.

IV. *The Queen versus Riel.*

Riel was taken prisoner, and incarcerated at Regina to await his fate. The government was determined to put an end to this troublesome insurgent, and took steps to have him tried for high treason. On the 20th of July, 1885, he was brought before a stipendiary magistrate, and charged with high treason upon an affidavit made by the chief of police of Hamilton, Ontario. No coroner's inquest had been held nor indictment found by a grand jury. Riel was put in accusation by the deposition, on information, of a police officer, which was drawn in the ancient form of an indictment for high treason. This instrument consists of six counts. The first three allege that

[1] Queen *vs.* Riel [Can. Pub. Doc.], p. 10 *et seq.*

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Riel was a subject of the queen, and set forth three localities at which he committed high treason; the other three do not allege that he was a subject, but repeat the allegations of the first three counts. I subjoin one count,—the first,—which will illustrate them all, as they differ only in the detail referred to, and the matter of dates and places where the acts were committed.

That Louis Riel being a subject of Our Lady the Queen, not regarding the duty of his allegiance, nor having the fear of God in his heart, but being moved and seduced by the instigation of the Devil, as a false traitor against our said Lady the Queen and wholly withdrawing the allegiance, fidelity, and obedience which every true and faithful subject of our said Lady the Queen should and of right ought to bear to our said Lady the Queen, in the year aforesaid, on the twenty-sixth day of March, together with divers other false traitors, to the said Alexander David Stewart unknown, armed and arranged in warlike manner, that is to say, with guns, rifles, pistols, bayonets, and other weapons, being then unlawfully, maliciously, and traitorously assembled and gathered together against our said Lady the Queen, at the locality known as Duck Lake, in the said Northwest Territories of Canada, and within this Realm, and did then maliciously and traitorously attempt and endeavour by force and arms to subvert and destroy the Constitution and Government of this Realm as by law established, and deprive and depose our said Lady the Queen of and from the style, honour, and kingly name of the Imperial Crown of this Realm, in contempt of our said Lady the Queen and her laws, to the evil example of all others in the like case offending, contrary to the duty of the allegiance of him, the said Louis Riel, against the form of the statute in such case made and provided and against the peace of our said Lady the Queen, her crown and dignity.[1]

The prosecution called fourteen witnesses, who testified as to the disturbances alleged to have occurred in the three several localities mentioned in the indictment, and as to the leadership of Riel in these outbreaks. Many exhibits of letters and proclamations by Riel were also introduced to substantiate the case for the queen. The defence began their case by calling Father Alexis André, superior of the Oblats in the district of Carlton, and endeavoring to show the state of affairs in the Saskatchewan valley, the number of petitions sent to the gov-

[1] Queen *vs.* Riel [Can. Pub. Doc.], p. 1.

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ernment, and the inattention they received. These questions were ruled out on account of the following objections:

1. That they asked for matters of opinion.

2. That they were irrelevant to the issue.

3. That the case was opened by putting in a defence of insanity, and these questions sought to justify armed rebellion for redress of grievances, and the two defences were inconsistent.[1]

The defence then confined their attention to the insanity of the prisoner, and called five other witnesses, two of whom were experts on insanity. Dr. François Roy of Quebec testified that Riel had been confined for nineteen months, ending January 21, 1878, in a lunatic asylum at Beauport, of which the witness was medical superintendent; and that Riel was then, and at the date of witness's testimony, afflicted with a form of insanity known as *megalomania*, by which he labored under a delusion that he had a mission to perform for the Métis. The cross-examination of this witness by Mr. Osler of the Queen's counsel was very severe, and the witness seemed to break down under it. The crown then called seven witnesses in rebuttal, two of whom were experts, and the preponderance of evidence was plainly with the prosecution. However, this may have been accidental, since so few experts were at hand, and since they had arrived at conclusions in a few hours which they substantially admitted on cross-examination they could not be certain of without making observations extending over months.

Riel was permitted to address the jury both before and after their verdict. In the first speech he dwelt largely on the matter of his insanity, and denied it most emphatically. He called upon the jury to acquit him on the ground that he was justified by reason of the ill-treatment which the Half-breeds in general, and he in particular, had suffered from the government.

The judge then delivered his charge, in which he followed the rule in MacNaughten's case. That rule is as follows:

> Notwithstanding the party did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he

[1] Queen *vs.* Riel [Can. Pub. Doc.], p. 110.

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is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he acted contrary to law.[1]

The jury rendered a verdict of guilty, but at the same time recommended the prisoner to the clemency of the queen. Riel then made his second speech, in which he endeavored to justify the rebellion of 1885 by the fact that that of 1869, which he led with the same objects in view, was practically justified by the subsequent action of the government in pardoning all concerned, giving Manitoba a responsible government, and acceding to the land claims of the Half-breeds.

An appeal was taken to the Court of Queen's Bench, Manitoba, and each of the three judges of that court wrote an exhaustive opinion affirming the conviction. The case was then taken to the Queen's Privy Council, the court of last resort for colonial appeals, where the judgment of the lower court was confirmed.

Before examining the decision of the court and the questions of public law involved therein, I wish to say that I do not think the question of Riel's insanity was amply tried. The peculiar kind of mental disorder attributed to him is one which does not render the mind totally unsound, and which it is therefore quite easy for an impostor to counterfeit.[2] The experts naturally hesitated to give a decided opinion based upon an examination of a few hours; and so few were called as witnesses, and the division of opinion was so nearly even, that it is uncertain to my mind, from a careful consideration of the evidence solely, whether Riel was a lunatic or an impostor. I am inclined to think he was simply a conceited adventurer; and that his mental disorder, if he had any, was not serious enough to deprive him of self-control and responsibility for his acts — for arousing the Half-breeds to rebellion and the Indians to massacre.

The opinion that the question of Riel's sanity had not been fairly tried was held by a great many persons; and efforts were made on this ground to induce the government to appoint a medical commission to examine the condemned man. This

[1] 10 C. L. & F., 204. [2] Queen *vs.* Riel [Can. Pub. Doc.], p. 120 *et seq.*

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the government refused to do; and as the day of execution approached, the matter excited increasing interest both in Canada and in the United States.[1] Petitions began to pour in upon the government from people of every quarter, creed, and political faith. When it became well understood that the Orangemen of Upper Canada demanded Riel's blood in expiation for the murder of their brother, Thomas Scott, by Riel's provisional government in the rebellion of 1869, the people of Canada became profoundly stirred. The French Canadian Roman Catholics menaced the perplexed ministry with insurrection, political slaughter, and dire vengeance if they permitted Riel to be executed. The Orangemen threatened to relegate the members of the Cabinet to private life if Riel were not executed. The wily premier, Sir John MacDonald, found himself between two fires. He reprieved Riel — and postponed his own decision — three times; but this only made the embittered factions more eager and violent in their agitation. At last the administration decided to shoulder the responsibility, and let the law take its course. Accordingly, on the 10th day of November, 1885, at Regina, the seat of government of the Northwest Territories, the death penalty was inflicted upon Louis Riel for the crime of high treason.

Taking up now the features of the case that have most interest for the student of political science, we notice, in the first place, that although the affidavit of indictment was evidently prepared to meet the objection that Riel was a naturalized American citizen, and therefore no subject of the queen, the counsel on both sides omitted all reference to this fact. It seems to be generally believed that Riel was naturalized during his residence in the United States.[2] If this be true, there can be no doubt that he ceased to be a British subject. The effect of naturalization, long a mooted question between the English and American governments, was definitely settled by the treaty

[1] Gibbet of Regina, pp. 79 *et seq.*

[2] I have not been able to get an authentic statement upon this matter; but Hon. Joseph Tassé, M. P., editor *La Minerve*, has written me: "There cannot be the slightest doubt of the fact that he became an American citizen."

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of 1870. Riel was accordingly entitled to the same protection which would be due in like case to a native citizen of the United States. When it became evident that Riel was about to be executed under sentence of the Canadian court, the United States government was asked to interfere in his behalf on account of his American citizenship acquired during his residence in Montana. In this matter, Major Edmond Mallet of Washington, D. C., acted for Riel. He has very kindly written me a letter, in which he succinctly narrates his efforts in Riel's behalf, and the position taken by our government. He says:

I first consulted Mr. Bayard, and he took this position substantially:

1. That it was not the duty of the government to inquire into the fact of Riel's American citizenship; and,

2. That the government could not interfere even if he was an American citizen, either natural or adopted. If a case was brought to the attention of his department, it would be examined into; but under no circumstances could the government, he thought, interfere unless it was shown conclusively that he had been discriminated against during his trial by reason of his American citizenship.

When it became apparent to me that the Canadian government had committed itself to the execution of Riel, under the pressure brought to bear upon it by the Orange lodges of Ontario, I went to the President and appealed to him to prevent this judicial murder. I based my appeal on the following [grounds]:

1. That Riel was an American citizen; that he had been indicted as a British citizen, his American citizenship having been entirely ignored, although offer had been made to prove the fact by documents captured at the battle of Batoche, and then in the Canadian government's hands; and that he had been tried by a half jury of six men selected by the judge, and that the judge was a mere justice of the peace.

2. That Riel was insane, — and I offered testimony to that effect, — and

3. That the authority to put a human being to death for any cause whatsoever is not inherent in government, but is delegated from God, and that such delegated power can be exercised only in certain conditions, such as sound mind, *etc.* The President seemed much interested in the case; expressed himself in sympathy with what I told him; but he considered it a very grave matter to interfere. At last I asked that he send for Mr. Bayard and the British Minister, and see if an

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amicable understanding could be made to save Riel. The President then said he would consult with the Secretary of State, and see what could be done.

During the night of the same day, the associated press announced that the President had been constrained to decline interfering in the matter.

The position taken by Secretary Bayard rests on sound international law. Our government would not have been justified in interfering in the matter on the basis of the case presented to the Department of State. Although Riel was a naturalized American, he owed the Queen of Great Britain temporary allegiance while living within the borders of her realm, and he made himself liable for breach of the criminal law of the land. The statute 25 Edward III, cap. 2, declares what offences should be adjudged treason, and the third division was held to be applicable to Riel's case. Blackstone, commenting on this portion of the statute, says:

> The third species of treason is, "if a man do levy war against our Lord the King in his realm"; and this may be done by taking arms, not only to dethrone the King, but under pretence to reform religion, or the laws, or to remove evil counsellors, or other grievances.[1]

Not only had the government of the United States no right to interfere in Riel's behalf, but the Canadian court was in the right in ignoring Riel's citizenship. It was absolutely immaterial.

The defence set up six pleas on appeal, but relied principally on three, which were solemnly argued before the Court of Queen's Bench, in Manitoba, and the Privy Council, in London. These three were substantially as follows:

1. The evidence at the trial was not taken down in writing by the trial judge, as directed by the statute.

2. The Canadian statute under which Riel was tried did not give the stipendiary magistrate's court jurisdiction over the crime of high treason.

[1] Blackstone, book iv, p. 81.

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3. If the Canadian statute purported to give such jurisdiction, the said statute was *ultra vires* the Dominion Parliament.[1]

The defence offered to sustain the first point by proving that the minutes of the trial were taken down by reporters instead of by the magistrate; and that the same were taken in stenography instead of long-hand writing. This point was best discussed by Wallbridge, C.J., who said:

I am of opinion that, *for the trial*, the stipendiary magistrate is not bound to take down the evidence, but he is bound to do so to forward the same to the minister of justice. In my opinion, there is no departure from the direction of the statute. He does cause them to be taken. The direction, first to take them by short-hand, and then to extend them by writing, is all one direction, or causing to be taken. This seems to me a reasonable compliance with the requirements of sub-section seven. Is it not too rigid a reading of the statute to say that the writing must be done whilst the trial progresses? Sub-section eight does not say a copy shall be sent to the minister of justice, but "full notes of the evidence shall be sent to minister of justice."

Suppose the notes of the evidence were burned by an accident — would the prisoner be denied his appeal?

The Crown has not objected to the evidence as furnished by the prisoner. The exception is purely technical, and in my opinion is not a valid one.[2]

It was attempted to uphold the second point by the argument, that high treason is a peculiar offence of great magnitude, and, unless especially mentioned, is not to be implied from the context of the statute. This point was disposed of by Killam, J., in these words:

That the Canadian Parliament intended that the Court constituted under the Northwest Territories Act of 1880, section 76, sub-section 5, and following sub-sections, should have power to hear and try a charge of treason, there can be no doubt. After provision is made for the trial of certain charges in a summary way, without a jury, the provision in sub-section 5 is, that "*in all other criminal cases* (which must include a case of high treason) the stipendiary magistrate and a justice of the peace, with the intervention of a jury of six, may try any charge against

[1] Queen *vs.* Louis Riel [Can. Pub. Doc.], p. 199. *New York Herald*, November 3, 1885. 10 Appealed Cases, Engl. L. R., 675.

[2] Queen *vs.* Louis Riel [Can. Pub. Doc.], p. 180.

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any person or persons for any crime"—which must include the crime of treason.

Sub-section 10 provides that "any person arraigned for *treason* or felony may challenge peremptorily and without cause not more than six jurors." It was remarked that this is the only mention of treason in the act, but it was the only occasion for its being specially mentioned.

In view of the peculiar right of challenge in a case of treason, under the laws of England, it was important to place it beyond doubt, by special mention, that in a case of treason, as in any other case, the number of peremptory challenges was to be limited to six. The wording of the sub-section may not be strictly correct, as not recognizing that treason is a felony, but the sub-section is not on that account of any less importance as showing the intention to give to the court jurisdiction over a charge of treason.[1]

The third and principal point relied upon was clearly stated and ably examined in the opinion of Taylor, J.:

It was contended by the appellant's counsel that the Imperial statutes relating to treason, the 25 Edw. III, c. 2; 7 Wm. III, c. 3; 36 Geo. III, c. 7; and 57 Geo. III, c. 6, which define what is treason, and provide the mode in which it is to be tried, including the qualifications of jurors, their number, and the method of choosing them, are in force in the Northwest Territories. And it was argued, that in legislating for the Northwest Territories, the people of which are not represented in the Dominion Parliament, that Parliament exercises only a delegated power, which must be strictly construed and cannot be exercised to deprive the people there of rights secured to them as British subjects by Magna Charta, or in any way alter these old statutes to their prejudice. The question then is, What powers of legislation with reference to the Northwest Territories have been conferred upon the Dominion Parliament by Imperial authority? In the exercise of that authority, whatever it may be, it is not exercising a delegated authority. To the extent of the powers conferred upon it, the Dominion Parliament exercises not delegated but plenary powers of legislation, though it cannot do anything beyond the limits which circumscribe these powers. When acting within them, as was said by Lord Selborne in The Queen *vs.* Burah, L. R. 3 App. Ca., at p. 904, speaking of the Indian Council, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large and of the same nature as those of that Parliament itself. That the

[1] Queen *vs.* Riel [Can. Pub. Doc.], pp. 194 *et seq.*

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Dominion Parliament has plenary powers of legislation in respect to all matters entrusted to it was held by the Supreme Court in Valin *vs.* Langlois, 3 Sup. C. R. I, and City of Fredericton *vs.* The Queen, 3 Sup. C. R. 505. So also, the judicial committee of the Privy Council have held, Hodge *vs.* The Queen, L. R. 9 App. Ca. 117, that the local legislatures when legislating upon matters within section 92 of the British North America Act, possess authority as plenary and as ample, within the limits prescribed by that section, as the Imperial Parliament in the plenitude of its power possessed and could bestow.

The learned judge then recites the passage of the Rupert's Land Act (31 and 32 Vict. c. 105), providing for the temporary government of the Hudson's Bay Territory after its annexation to the Dominion; and the British North America Act of 1871 (34 and 35 Vict. c. 28), confirming the foregoing act. In the first of these acts occur the following words:

> And thereupon it shall be lawful for the Parliament of Canada, from the date aforesaid, to make, ordain and establish within the land and territory, so admitted as aforesaid, institutions and ordinances, and to constitute such courts and officers as may be necessary for the peace, order and good government of Her Majesty's subjects and others therein.

And in the second of these acts, section 4 runs as follows:

> The Parliament of Canada may from time to time make provision for the administration, peace, order and good government of any territory not for the time being included in any province.

He then concludes:

> Acting under the authority given in the most ample manner by these Acts of the Imperial Parliament, and, as it seems to me, in the exercise not of a delegated authority, but of plenary powers of legislation, the Dominion Parliament enacted the Northwest Territories Act, 1880 (43 Vict. c. 25), which provides, among other things, for the trial of offences committed in these Territories in the manner there pointed out.[1]

As this decision was confirmed on appeal by the Privy Council, the case of The Queen *vs.* Riel puts at rest all doubts that may have existed as to the plenary authority of the Dominion

[1] Queen *vs.* Louis Riel [Can. Pub. Doc.], pp. 183 *et seq.*

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Parliament. The necessary inference from the decision of Riel's case, and those cited to sustain it, is that the Canadian Parliament is a legislature of limited jurisdiction, and not of enumerated powers. The distinction between these two kinds of bodies is, that a legislature of limited power is a dependent legislature which has sovereign authority over all subjects of legislation, but is limited in the extent to which it can exercise those powers by such restrictions as are inherent in its subordinate relation to the paramount legislature; whereas a legislature of enumerated powers is a dependent legislature which has sovereign authority over certain enumerated subjects of legislation, but all matters not expressly mentioned or necessarily implied in the enumeration are reserved to and reside in the paramount legislature.

There is another point of peculiar importance suggested by the decision in Riel's case. The crime of high treason is peculiarly an offence against the sovereign power of the state. To vest in the colonial legislature the power to define and regulate the trial of treasonable offences may sooner or later lead to a conflict between the colony and the home government. The Canadian parliament, in the plenitude of its authority, may choose some day to make it practically impossible to convict of treason in cases which England may consider highly treasonable; for it is just as easy to pass a law making it difficult to convict as it is to enact one making it facile. It is quite true, as Judge Killam said in his opinion in Riel's case:

> Even jurisdiction to declare what shall be and what shall not be acts of treason, when committed within Canada against the person of the Sovereign herself, might safely be committed to the Parliament of Canada when the Sovereign is a part of Parliament, and has also power of disallowance of Acts, even after they have been assented to in her name by the Governor General.[1]

But despite this fact, the way is left open for Canada to initiate a law to which the royal assent cannot be given without practically severing the bond of allegiance uniting Canada to Eng-

[1] Queen *vs.* Louis Riel [Can. Pub. Doc.], p. 194.

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land, and from which the royal assent cannot be withheld without precipitating a serious conflict — perhaps a revolution. Then indeed the Riel decision would play an important role.

The outlook for the Half-breeds is not altogether promising until they become less nomadic in their habits. Great discretion must be exercised by the government in its land policy. In giving the Half-breeds letters patent to their holdings, care must be taken on the one hand not to make them so uncertain as to discourage improvements on the property, and on the other hand not to make them too easily assignable to land speculators on the lookout for opportunities to defraud the improvident Half-breeds. I believe the Half-breeds of the great "fertile belt" will become an industrious farming population, and add great strength and importance to Canada. I do not believe that they will be forced again to armed rebellion for a redress of grievances; but I am quite sure that their political struggles will not be ended until they are numerous enough and sufficiently capable of self-government to be organized into a province of Canada. Since the close of Riel's second rebellion, measures have been set in motion to accomplish this; and last November the Northwest Council, which governs the affairs of the unorganized territory, after one week's deliberation agreed upon the distribution of seats. Under this adjustment Assiniboia will have 13 members, Saskatchewan 4, and Alberta 8.

When this change is made, and the Northwest Territory becomes a self-governing province, the cause for rebellions among the Half-breeds, we may hope, will be forever removed.

THOMAS D. RAMBAUT.

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SOURCES AND LITERATURE.

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Besides the foregoing, I have consulted the files of various newspapers of Canada and of the United States, particularly the *Toronto Globe* and the *New York Herald*. I am also indebted to various Canadian barristers and public men for valuable information given in interviews and letters.

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REVIEWS.

The Chief Periods of European History. By EDWARD A. FREEMAN, M.A., hon. D.C.L. and LL.D. London, Macmillan & Co., 1886.

Professor Freeman publishes six lectures delivered during the year 1885 at the University of Oxford, and adds to them an essay on "Greek Cities under Roman Rule," which is reprinted from the *Contemporary Review*. This is the second course by Dr. Freeman which has appeared since his appointment to the Regius Professorship.

The first of these lectures treat of "Europe before the Roman Power"; that is, of Europe between the first olympiad and the Teutonic invasion of Gaul. According to the author, the periods of European history may be classified with reference to Rome. "We have Europe before the headship of Rome arose; we have Europe under the headship of Rome, even if that headship was sometimes disputed and divided. Lastly, we have Europe since the headship of Rome has altogether passed away." (Page 4.) The six lectures deal with these three periods.

In connection with the advance of European history, there has always been what Dr. Freeman calls the "Eternal Eastern Question." This is "the undying question between the civilization of the West and the barbarism of the East." The views of the author on this question are too well known to require extended notice here. But his attention is especially turned to the influence of Greece as a formative power in the Roman world which was to arise. This influence he regards, however, as indirect rather than direct. "The decree had gone forth that Greece in her new guise was to leaven the East, was for a while to rule over the East, but that in the West the political power of the Greek race was to die out, that even its intellectual influence was to be indirect, — an influence which had to accept Roman masters and disciples as its instruments." (Page 34.) The rising power of Rome is next described in Dr. Freeman's accustomed vivid and thorough way. The significance of the Roman supremacy is suggested where he speaks of the conquest of the North. "It was one stage towards that wedding of Gothia and Romania, the offspring of which is the world in which we live." (Page 71.)

The lecture which especially invites attention is the last, in which the author discusses the subject of the "World Romeless." In the preceding lectures he has shown that Rome, having become supreme in the

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West, "burst suddenly into the midst of another political system, a system of kingdoms and commonwealths, which was in many points a forestalling of the political system of the world in which we now live." (Page 176.) With the decline of Roman supremacy, the nations of Europe have acquired an independence of one another like the independence of cities and kingdoms at an earlier day. "The best witness to this fact is to be found in the acknowledged importance and the confessed difficulty of the doctrine of International Law." The comparison drawn between the Europe of ancient and of modern times is of great interest, although in some instances it seems to us rather forced. Dr. Freeman concludes that the latest times are in truth a return to the earliest times, with this difference, that nations have taken the place of cities. (Page 183.)

It may be well to add that in the closing words of his course, the students are invited to read the author's "Lectures to American Audiences." Professor Freeman's spoken discourses seem to be no better attended at Oxford than they were on Fifth Avenue; possibly for different reasons, for in his valedictory he says: "And so I bid you farewell for a few months, finding fault with you in nothing, except that, like most Professors, I wish there were more of you. But one therefore feels all the more kindly to the elect, the faithful, the little band that watched with Alfred, the stout hearts that lapped with Gideon, even though they be far from reaching the full tale of three hundred." (Page 206.) Mr. Arnold's "remnant" was apparently there.

ARCHIBALD ALEXANDER.

Histoire de la science politique dans ses rapports avec la morale. Par PAUL JANET, membre de l'Institut, professeur à Faculté des Lettres de Paris. 3me édition. 2 tomes. Paris, 1887.

There are few good books in any language which give a history of political science. This is one of the few. Of political histories, that is, histories of political institutions, there are many; but it is difficult to find a consecutive account of the theories themselves, independent of political events. Germany and Italy are the only countries where much work has heretofore been done in this department, and the few Italian works have been marked by prejudice and superficial learning.

In France, M. Janet has, so far as we know, but one predecessor in this field of inquiry. This predecessor is Lerminier, whose work was finished in 1831 and was only a general introduction to the subject. In English there is no work of the kind, although there are histories of law and of philosophy.

In the new edition of his work, M. Janet treats of the latest as well as

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the earliest theories of the state. We have chapters on the political philosophy of the revolution period, including a notice of American publicists. The author is a critic as well as an expositor, and does not hesitate to express his views with respect to the doctrines about which he writes. As the title of the book indicates, he treats his subject chiefly in its relation to ethics, thus implicitly recognizing the unity of practical philosophy.

The introduction to the third edition and the closing chapters of the second volume are the parts which are of present interest. We have our attention called in both cases to the principles of the American and French revolutions, of the American and French republics. In comparing the French and American reactions, the author makes some observations which we venture to translate:

> In England and in America, it has been said, the Anglo-Saxon race, more positive, more practical, less transcendent, has gone directly to the point, and has been contented with the possible, without too much thought of the ideal. . . . In France, on the contrary, it is from the principles of an abstract rationalism that the germ of revolution has been planted for all time. . . . That is why, it is said, the revolution in France has been so violent, so fanatical; and that is why it has not yet come to an end, while, long since, England and America, resting on like principles, have found stability, and offer us the model of the strongest and most solid societies which to-day exist. [Vol. i, p. vii.]

There are some remarks, in the conclusion of the book, on sociology, which we would like to see more elaborately discussed. M. Janet looks with but little favor on radicalism. His position appears to be that of the Christian moralist and the conservative republican.

There is an *Index Bibliographique* in the second volume, which adds greatly to the value of the work.

A. A.

Le Pacha Bonneval. Par ALBERT VANDAL. 1885.

L'Expansion de l'Allemagne. Par JULES FLAMMERMONT. 1885.

Les Services publics de protection de l'enfance. Par LOYS BRUEYRE. 1886.

Cercle Saint Simon, Annuaire. 1886.

Paris, au Cercle Saint Simon.

The *Cercle Saint Simon*, founded in Paris in 1881, with the Athenæum Club as its model, aims to provide literary men with a place for social intercourse. Its name is no index to the character of the club. An historical society was organized in connection with the *Cercle*, with the

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purpose of stimulating the study of history and kindred subjects by means of lectures and publications. The undertaking has proved very successful. The society publishes a bi-monthly bulletin of its proceedings, monographs on political subjects, and edits a collection of historical manuscripts.

The first publication of this society was *Le Pacha Bonneval*, an extremely well-written and interesting biography. Bonneval was a French adventurer of the eighteenth century, who fought under the French flag, then under the Austrian, and finally became a three-tailed Turkish pasha. He directed the foreign policy of the Porte, in great measure, from 1733 to 1739, and his reorganization of the Turkish army contributed more than anything else, probably, to the successful issue of the war of 1736–1739 between the allies, Austria and Russia, and the Porte. The aim of his diplomacy was to introduce Turkey into the European system, and thus to restore the balance of power lost in the Northern war, 1700–1721. He wished to assure the neutrality of the Archipelago, and all other Turkish seas and waters, in time of European war, and to destroy the pirates with which they swarmed. He desired to galvanize the Ottoman Empire by securing to it the distribution of Indian products, by means of a canal from the Red Sea to Cairo. The essay is based upon original documents in the archives of the French ministry of foreign affairs.

L'Expansion de l'Allemagne shows how the German nation has planted offshoots in all quarters of the globe that will prove sources of strength in the coming great conflict. The German schools, it is claimed, prevent these colonies from amalgamating with their neighbors, and maintain their affection for the mother country. The book is marked by a tone of intense hostility to Germany.

Les Services publics de protection de l'enfance deals with the efforts made in Paris to rescue foundlings and street Arabs from physical and moral destruction. The history of the movement for the care of foundlings is traced from 1360 to the present day, and the excellent system by which they are received, registered, named, and sent to the country, is set forth. Only since 1881 has provision been made by the General Council of the Seine for the *moralement abandonnés*, — minors of sixteen years who have become habitual beggars, vagabonds, or prostitutes. Previously they were consigned to solitary confinement in houses of correction for a term of years. Now they are apprenticed, or are sent to technical schools, and pay off the cost of their clothing, food, and shelter, besides laying something by in the savings bank. The essay is highly interesting and deserves careful perusal.

ROBERT WEIL.

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Geschichte des preussischen Verwaltungsrechts. Von CONRAD BORNHAK. Berlin, Verlag von Julius Springer, 1884–6. — 3 vols., large 8vo, xiv, 434, xvi, 366, x, 350 pp.

This work on the history and development of Prussian administration, now brought to its close by the publication of the third volume, supplies a real want. Up to the time of its writing, there was no satisfactory book on the historical development of the Prussian or indeed of any German administrative system. What M. Dareste de la Chavanne did years ago for the early history of French administration, our author has now done for the German — for, barring minor differences of detail, the history of Prussian government is that of German government. The first volume of this work treats of the period which begins with the stationing of a margrave in the mark of Brandenburg, and ends with the accession to the throne of Frederick William I. This division seems to be a natural one, since, as Mr. Bornhak shows, with Frederick William I begins the modern conception of the Prussian state with its trained official service. The second volume carries the history to the peace of Tilsit; and here again no better division could have been made, since feudal Prussia ends with this famous treaty. The reforms of Stein and Hardenberg which followed the peace of Tilsit cleared away the *débris* of feudalism and prepared the ground for the building up of modern Prussia. The third and last volume, which is almost exclusively devoted to these reforms, carries the history up to the latest administrative changes of 1872 and 1875, with their subsequent amendments. This volume offers to political students a mass of exceptionally valuable material. It is by far the most interesting of the three. It not only deals with the most interesting period, but the introductory and concluding chapters which the author has added to the body of the work are so well written that they cannot fail to attract the attention and stimulate the thought of all who read them.

The second volume is also interesting, since it treats of a time whose connection with our own is not at all remote; but the first will probably be used chiefly by special students of Prussian history and administration as a book of reference.

The third volume should, however, be read by every one who desires to understand the present condition of Germany. For though the foreign policy of the "iron chancellor," and the military triumphs of his administration, have chiefly attracted and almost absorbed the attention of the foreign observer, his ceaseless energy has also found wide field for action at home in the undramatic details of local government. Bismarck has left as lasting an impression on Prussian administrative law as on the map of Europe. As soon as the stirring years immediately

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before and after 1870 had passed, he began to take up those internal problems which Stein had left unsolved. The only part of Stein's administrative reform that had been successful was the Municipal Corporations' Act of 1808. Napoleon's hatred had driven him from Prussia before his elaborate scheme of "Selbstverwaltung" had been more than sketched. He had studied the local self-government of England, and was persuaded that it was bureaucratic government, together with class conflict, that had made Prussia an easy victim to French aggression. He wished therefore to abolish many class privileges, create social equality, and make participation in government and administration not only the right but the duty of all classes. Future class conflicts he hoped to avoid by means of this system of self-government. Its complete establishment was the final purpose of his reforms. But the plan was too far ahead of the time, and though his immediate successor attempted to convey it out, he failed utterly. Hardenberg next came to power. His aim was social rather than administrative. He believed that no efficient system of self-government could be built up in a society based to so great an extent upon guilds and feudal privileges as was the Prussian. His plan was to sweep away all class privileges, and thus render self-government possible. But to enforce his laws he needed a corps of servants in complete subordination to him. He re-created the bureaucracy of Frederick William I. He obtained through it a greater social equality; but the very excellence of his bureaucracy put back for many years the formation of any self-government, and after his death this same bureaucracy was made an efficient tool of party despotism. This reached its height in the revolutionary period of 1850 and the following years, — the time when Bismarck comes upon the scene. Convinced of the evil of such an administrative system, Bismarck threw the whole weight of his great influence in favor of decentralization in his own state; and, strange as it may seem to those who are accustomed to regard Bismarck as a brutal tyrant, jealous of popular power, it is mainly owing to him that Prussia has obtained more self-government than England herself has at present. Professor Gneist of Berlin, one of the leaders of this movement for self-government, demonstrates this in a very interesting article published in a recent number of the Roumanian *Revue du droit et des sciences politiques*. — The history of this movement, from the time of Stein down to the present day, is given in the third volume of the work before us.

One criticism must be made upon the work as a whole. The plan of arrangement is somewhat artificial. It is not original with the author: it is evidently borrowed from Professor Gneist's works on English law. Even in Gneist's masterly hands the defects of the plan are sometimes evident; and in Mr. Bornhak's book the continuity of the narrative is

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broken in a manner very trying to the reader. As to matters of detail, the work is generally reliable. But the reader should be cautioned not to take Mr. Bornhak's description of the formation of the Customs Union (*Zollverein*) as an embodiment of the last results of historic research. In the last volume of Treitschke's *German History*, it is shown that the establishment of this Union was due far more to the foresight and skill of von Motz, Minister of Finance, than to the policy of Chancellor Hardenberg. Taking the book as a whole, however, I do not hesitate to say that no work on politico-legal history has appeared in recent years which will better repay careful reading than the one before us.

FRANK J. GOODNOW.

A Treatise on the Limitations of Police Power in the United States, considered from both a civil and criminal standpoint. By CHRISTOPHER G. TIEDEMAN, A.M., LL.B., Professor of Law in the University of Missouri, *etc.* St. Louis, The F. H. Thomas Law Book Co., 1886. — lxv, 662 pp.

"Police power" is such an indefinite expression that it is almost impossible to find fault with any use that may be made of it. Originating with the Greek word πολιτεία, it has been imported into our language through the Latin *politia* and the French *police*. Among the Greeks and Romans the meaning of the word police was the whole constitution and government of the state. During the middle ages it had the same signification. Thomas Aquinas uses it in this sense in his *De regimine principum*. Later the police power comes to mean the power to preserve the good order and prosperity of society in any way whatever; while in the latter part of the seventeenth century police is distinguished from military power and from the administration of finance and justice, and is thus synonymous with the entire internal administration as distinguished from these other administrative branches. This is very often the sense of the word police in this country. We find chapters in the revised statutes of the different states devoted to the "Internal Police" of the state.

Of late years European legal science has circumscribed the meaning of police power, confining the term to those cases in the "internal administration" in which the state steps in and commands or forbids persons within its jurisdiction to do certain things. The law of the police power, under this delimitation, is a part of the public law, and any treatment of matters of purely private law is not called for — indeed, it is actually out of place — in a treatise on the police power. This is

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one fault to be found with the book before us. With all due allowance for the indefiniteness of the subject, it must be admitted that even the broad American conception of police power hardly includes such matters as criminal law and the law of taxation, or such purely private law subjects as assault and battery, libel, the relation of husband and wife, real property, *etc.* It seems doubtful whether our author, notwithstanding his German legal studies, has any idea of the distinction between public and private law. On that account his book is of no very great value to one who desires to know what are the constitutional limitations of the American police power. The book is rather a general though incomplete treatise on the constitutional limitations of the legislative power in our country.

As a treatise of this sort — and indeed as a legal treatise of any sort — the book has one or two glaring faults. One is that it is confessedly written to demonstrate a principle. The author says in his preface (page vii), that the principal object of this book is to show

> by a detailed discussion of the constitutional limitations upon the police power in the United States, that under the written constitutions, Federal and State, democratic absolutism is impossible in this country, as long as the popular reverence for the constitutions in their restrictions upon governmental activity is nourished and sustained by a prompt avoidance by the courts of any violations of their provisions in word or in spirit.

From a writer who thus at the outset assumes the position of an advocate, we can hardly expect an impartial exposition of the law.

Another central fault in the book is Mr. Tiedeman's belief that there exists *in law* such a thing as a "natural right." It is all very well for a political philosopher or a teacher of ethics to talk about natural rights, but a lawyer writing a legal treatise can make no legitimate use of such conceptions. Our author, however, begins his work with the statement that the majority of private rights "do not rest upon the mandate of municipal law as a source. They belong to man in a state of nature; they are natural rights, rights recognized as existing in the law of reason." Such a premise, as might be expected, leads to numerous absurd conclusions. For example: on pages 18 and 19, the author says he cannot see on what legal grounds a sane man can be prevented from taking his own life; for, since a crime must in every case be a trespass on the rights of others, suicide is not a crime, and the rule of law which makes it such is in contradiction with the maxim, *volenti non fit injuria*. On the same principle, if a man kills another at the latter's request, "the killing," if the deceased were sane, "is no more a crime than if it was done by the unfortunate man himself." Mr. Tiedeman admits, however, that such a rule might offer opportunities for felonious murders, and on that account

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"the state can very properly prohibit the killing of one by another at the latter's [*sic*] request." In another part of the book, Mr. Tiedeman is led by his natural rights theory to the absurdity of saying that animals have rights. He can find no other justification for statutes preventing cruelty to animals. Sometimes the natural rights idea brings our author into conflict with the courts, whose heretical decisions he unhesitatingly condemns. For instance, in his section on "Miscegenation" (page 537), he says:

> Unless it can be established beyond a reasonable doubt that the intermarriage of white and black may be expected to produce frail and sterile offspring or threatens the general welfare in some other well-defined way, the duty of the courts is to pronounce those laws unconstitutional, because they deprive the parties so disposed to marry of their right of liberty without due process of law. But the prejudice of race has been too strong even in the judicial minds of the country to secure for these laws a scientific consideration, and hence they have repeatedly been held to be constitutional.

Such are the most noticeable faults of the book. In its favor is the fact that the author has attempted to write a treatise, not to make a mere digest. In these days, when compilations make up almost our whole legal literature, an attempt to produce a treatise deserves some recognition, however inadequate and faulty the result. Mr. Tiedeman's idea has been to lay down principles of law derived from cases, citing the cases in sufficient number to make his treatise useful to practising lawyers. The book is thus in general readable and often interesting. It becomes especially interesting when it shows how low our American legislatures have fallen in the eyes of lawyers and of the courts. It seems as if doubt were being cast on the truth of the old political principle that the state legislature is the residuary legatee of all governmental powers, and as if the courts were assuming to control the legislative power in accordance with their ideas of justice, even in the absence of a positive constitutional limitation. F. J. G.

The Supervisor's Manual: A practical treatise on the law applicable to the duties of supervisors, from the date of their election to the end of their official term, with the decisions of the courts and the necessary forms. By GEORGE C. MOREHOUSE, of the Utica Bar, formerly one of the supervisors of Oneida County. Albany, John D. Parsons, Jr., 1886. — Large 8vo, vi, 580 pp.

As Mr. Morehouse points out in the preface to his *Manual*, one of the marked tendencies of legislation in the state of New York (and, we may add, in most of the United States) is to intrust the control of gov-

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ernmental matters more and more to local officers. This process of decentralization began very early in New York. In 1691 the colonial legislature passed an act by which the county officers were no longer to be appointed by the governor, but to be elected by the people of the county. The elected supervisor supplanted the justice of the peace, who, as in England, was appointed by the central government of the state. This was perhaps as important a step as was ever taken in this country in the direction of local government, and has been followed by almost every state in the Union. Florida, I believe, is the only state which allows its governor to appoint its county officers; and it is said that he is there limited by custom in the exercise of his appointing power to the choice of the party caucus in the county. And not only have the local officers become in general elective, but many matters which used to be attended to by the state legislature are now put into the hands of these same local officers. In New York, two laws, one of 1849 and the other of 1875, which together form what may be called the county code, have conferred on boards of supervisors comparatively large powers of legislation and administration. This being the case, our local authorities have grown to be of much greater importance than in former times, and are destined, probably, to become the most important organs in the system of state government. Therefore it is that any book which, like Mr. Morehouse's, contains the whole law on the subject of local government, is of great use; indeed, it is a necessity to every lawyer and to every student of political science, as well as to the officers for whom mainly it is written. The *Supervisor's Manual* does not pretend to be a scientifically arranged treatise for the student, so much as a practical manual for the daily use of the supervisors themselves. Still, it is not badly arranged; and any one who wishes to make a study of New York local government will find it a great help. One peculiarly useful feature of the work is the insertion of the text of the most important laws. Chapter x, for example, consists entirely of legal texts with a digest of the decisions of the courts made in their interpretation. The work is accompanied by an index, occupying eighty pages.

F. J. G.

A Digest of the International Law of the United States, taken from Documents issued by Presidents and Secretaries of State, and from Decisions of Federal Courts and Opinions of Attorneys-General. Edited by FRANCIS WHARTON, LL.D. Three volumes. Washington, Government printing office, 1886.

Such a work as this, published under a resolution of Congress, is a gratifying indication that our federal legislature is not wholly devoid of

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usefulness, the daily press to the contrary notwithstanding. The value of Dr. Wharton's compilation is beyond question. Two obstacles stand prominently in the way of a satisfactory digest of our international law. In the first place, in the multiplicity of authorities on the subject, it is difficult to determine just where to draw the line which divides the weighty from the insignificant. And in the second place, when once the authentic organ of interpretation is decided upon, the fluctuation in the government's policy under different administrations renders it difficult to say just what its established principles are. As to the first difficulty, the editor of the work before us has grappled with it in the manner indicated on the title-page. The President and the Department of State are regarded as the primary interpreters of international law for this country. Following the opinions from this source, the decisions of the federal courts and the opinions of attorneys-general are cited. In further elucidation of the principles contained in these, quite copious extracts are presented from papers issued by the other executive departments, as well as from the private correspondence of prominent public men. References are also made, on points of controversial interest, to standard writers on public law.

The arrangement of subjects is systematic, following in the main the analysis usually adopted in treatises on international law. Under each topic are arranged in chronological order pertinent extracts from the different authorities mentioned above. This plan gives a sufficient quantity of material upon each point, and at the same time avoids too arbitrary a discrimination by the editor as to comparative weight of authority. In accordance with the special scope of the digest, particular attention is devoted to those topics of international law which have been conspicuous in our history. Separate chapters are given to "Indians," "Isthmus of Panama," "Fisheries," and "Guano Islands." Under the general head of "Treaties," the particular relations of the United States with thirty different nations are discussed, Great Britain naturally taking the lead in importance. Special care is taken to explain, either by quotation from standard histories or by editorial comment, the events upon which the enunciation of important principles has been based. Even such works as *The Greville Memoirs* are cited for this purpose. In connection with Mr. Webster's Hülsemann letter, Curtis's *Life of Webster* is drawn upon for a full account of the occasion, and even the actual composition of the note. While it is gratifying to know that Mr. Webster's title to the honor of the production is vindicated, the pertinence of this to international law may appear to some a little obscure. Dr. Wharton evidently has his heroes, in whose behalf even the objectivity of a law digest may now and then be sacrificed. But how will the admirers of Hamilton regard a work which contains only

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six extracts from unofficial writings of that statesman, against some thirty from Jefferson, including at least one from the *Anas*.

The difficulty of affirming a fixed principle as the established one, in view of conflicting policies at different periods, is met by the editor in a way that is better adapted to a systematic than to a historical view of the subject. Taking, for instance, the topic "Intervention with Foreign Sovereignties," the general rule is laid down as non-intervention, and this is supported by a strong array of authorities, from Washington's Farewell Address to Secretary Frelinghuysen's revocation of Mr. Blaine's instructions in the Peru-Chili affair five years ago. It is well known, however, that this general rule has been very severely strained in a number of instances, especially in our relations with other American states. No indication of these instances is given in the analysis, and the seeker after information on the subject must read through the whole article headed "Special Applications of Doctrine," to find such palpable deviations from the early principle as have occurred in the cases of Mexico, Panama, and Peru. A similar sacrifice of historical clearness is observable in the treatment of expatriation. It cannot be questioned that the right is at present generally recognized. No less true is it that up to 1859 the practical course of the departments conceded very much to the old doctrine of perpetual allegiance. This latter fact is not allowed to appear under the head "Expatriation," but may be gleaned from a perusal of the cases presented under "Status Abroad of Naturalized Citizens." It would probably be impossible to adopt a system of classification that would do equal justice to both the systematic and the historical view of our international law. The editor in this case has preferred the former method, and, with a warning to readers to bear this fact in mind, we are inclined to admit the wisdom of the choice.

The compiler has brought his work down to very recent times, quoting freely from the messages of President Cleveland and the instructions of Secretary Bayard. A concession to current political interest is manifest in the very copious presentation of the Peru-Chili negotiation in 1881–2, and the Cutting case of last year. The "Fisheries" question is not so fully treated, owing, as is explained in a note, to the fact that the whole matter is now under diplomatic discussion. What is given is practically a brief of the case of the United States under the treaties prior to 1870. The Halifax commission and award are noticed only in scattered allusions.

It is customary to set the diplomacy of the United States in a very unfavorable light in comparison with the work of the European experts. The instability in tenure of both the head and the subordinate agents of the executive department affords some ground for this position. But the great mass of material which Dr. Wharton has so skilfully collated

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in his digest very clearly demonstrates that, in respect to the most important principles of international right, the statesmen who have conducted our foreign affairs have displayed a vigor and a consistency that have contributed in no slight degree to the final form of the public law. In addition to the well-known papers that have emanated from the state department on famous occasions, such as the Hülsemann note, the Koszta correspondence, the negotiations following the capture of Mason and Slidell, *etc.*, a free use is made of instructions to foreign agents, heretofore unpublished, and these bear out in the common routine affairs the principles laid down on the more conspicuous occasions. But it must be confessed that in diplomatic etiquette, dress, precedence, social and official, and other such weighty matters, the digest reveals a deplorable weakness in our practice. The irritating attitude of foreign functionaries, especially the English, in our early history is set forth at length by extracts from John Adams' diary, and from the history of Madison's administration. Mr. Buchanan's trying situation in reference to "court dress" and his final adoption of a "small black-handled and black-hilted dress sword" to distinguish him from "the upper court servants," are detailed with care. This whole chapter is to the American mind of a distinctly humorous character; but that its subject continues to be of importance is made evident by the appearance of an extract from instructions to our Spanish minister dating as late as January 15, 1886. The influence of the United States in favor of simplicity in official ceremonial may ultimately be as effective in this as it has been in more important matters.

WM. A. DUNNING.

System der Finanzwissenschaft: Ein Hand- und Lesebuch für Geschäftsmänner und Studierende. Von Wilhelm Roscher. Stuttgart, J. G. Cotta, 1886.—8vo, x, 699 pp.

Few writers upon the science of economics enjoy a more enviable reputation than Professor Wilhelm Roscher of the University of Leipzig. His name, together with the names of Hildebrand and Knies, is inseparably connected with the rise of the historical school of political economy; but he is more widely known than either of his fellow-workers, a fact in large measure due to the lucidity of his style and to his masterly use of footnotes. Professor Knies of the University of Heidelberg is said, by those who can understand him, to be more profound, but the difficulty of grasping a sentence running over the half of a page and ending in five infinitives has proven a barrier to the wide reading of his works. Still Roscher's success cannot be wholly accredited to the clearness of his sentences. So forcible a reader as Lord Acton, whose

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acquaintance with the epoch-making literature of the world is perhaps unparalleled, claims that Roscher accomplished for his chosen science what Savigny accomplished for the science of jurisprudence, — that is to say, he brought the science of economics under the guidance of the law of historical development.

In 1854, Professor Roscher published a book entitled *Grundlagen der Nationalökonomie*, being the first volume of a systematic treatise upon the science of economics; the volume lying before us, bearing the date 1886, brings this monumental work practically to a close. I say practically to a close, for we are yet promised an "Abtheilung" devoted to *Nationalökonomik des Armenwesens;* but for the purpose of forming a just estimate of this system of thought we have now adequate data. The second volume, it will be remembered, treats of the economy of agriculture and mining; the third, of the economy of commerce and manufactures. It would be an interesting task, as well as an advantageous one to him who should undertake it, to subject this treatise upon the science of economics, which was thirty-two years in the process of construction, to a critical and expository analysis. What is the true position of Professor Roscher's writings in the growth of economic thought? Has he, in his later writings, kept apace with that development which he set on foot? Does he now represent German thought? Shall foreigners, who seem bent on going to Germany for inspiration, take their departure from him or from those who claim to have superseded him? Is it true that the text of his books shows little profundity of thought, that his classifications are tedious and wearisome rather than of assistance to the student, and that his books are tolerated mainly on account of their laboriously gathered footnotes? It is believed that many readers would greet with interest an essay which should endeavor to assign to the writings of the Leipzig professor their proper shelf in a library of political economy.

But turning to this volume on the science of finance, there are many points of interest which arrest our attention. Its chief competitors in the realm of fiscal science are the second volume of the handbook of political economy, edited by Schönberg, the encyclopædic work of Wagner not yet completed, and the lucid treatise of Leroy-Beaulieu. In English and American literature there is absolutely nothing which comes into comparison with these works. Of the books mentioned, that of Beaulieu is probably the best known to American readers; and for that reason, and because it is a French work written by a man in substantial sympathy with the political purpose of the French people, do I choose it for the purpose of comparison with the work of Roscher. And indeed there could be no greater contrast. These two profound scholars, writing for different peoples and in the presence of different problems to

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be solved, have emphasized different parts of the science of finance. M. Leroy-Beaulieu, speaking to the citizens of a republic, devotes the first one hundred and seventy-nine pages of his first volume to a study of budgets, for he fully understands that sound methods of fiscal legislation are essential to the success of popular government. Professor Roscher, on the other hand, writing for a people whose political liberty is limited by the right to accept or reject certain proposals presented to them, presents all he has to say on this important subject in a few pages at the close of his work. Should it ever come about that the prime minister of the German empire is held to responsibility for his financial measures, it will be necessary for Professor Roscher to rewrite this part of his treatise.

Another point of contrast between these two books appears when we consider the question of public debts. France is burdened with a great debt. She could have easily carried the weight of those obligations incurred during the Franco-Prussian war, but the increased indebtedness since 1878 is bringing her fearfully near the verge of bankruptcy. Germany, on the other hand, is practically free from debt. Her conservative management in matters of public improvements, the extensive domains of which her government has always maintained proprietorship, the fearlessness with which she imposes taxes, as also the use which she makes of uniforms and social position in paying the salaries of her civil and military servants, — all these peculiarities, as well as others that might be mentioned, permit her to maintain the unique position of holding her importance in the midst of European peoples without incurring heavy indebtedness. It is therefore no occasion for surprise to learn that while Beaulieu devotes five hundred pages to a study of public debt in all its phases, Roscher includes what he has to say on this subject in the fifth book of his treatise, covering one hundred pages, which he entitles "*Gleichgewicht zwischen Staatseinnahme und Staatsausgabe.*"

Upon what financial topics, then, does the German lay the greater emphasis? After an introductory chapter, which is devoted to what I may term the historical etymology of the word finance, Professor Roscher treats of the public income which arises from industries either wholly or in part of a private character (*ganz- oder halbprivatwirthschaftliche Staatseinnahme*). He here considers public domains, with reference both to their political importance and the rules for their administration. In this same "book" are included chapters on public forestry; income by feudal rights, fines, harbor money, *etc.* (*Regalwirthschaft*); upon fees of various sorts for payment of direct services (*Gebühren*); and upon commercial and business industries carried on by the state. Such topics, treated with learning and pretension, are characteristic of German writings on the science of finance. For the rest,

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this treatise takes up the subjects of taxation and public expenditures, devoting to the former subject three hundred and thirty-three pages.

This slight comparison between the works of Roscher and of Beaulieu will serve to impress the fact that the science of finance holds intimate relations to the structure of states and to the political purposes of peoples. It takes necessarily upon itself the local coloring of the time and place for which it is written. And the converse of this is also true. The absence from the literature of a people of any adequate treatise upon the science of finance shows them to be deficient in their appreciation of the importance of government. It is, then, no accident that financial topics have been treated by English and American writers as appendages to their works upon political economy; it is rather the logical result of the theory they have held respecting the limits of governmental control. Implicit trust in the regulative potency of competitive action is not conducive to the development of the science of finance. But there are many at the present time who are beginning to doubt the beneficent workings of unguarded competition, and who are willing to admit that personal liberty can only be maintained by preserving a just balance between public and private duties. Such persons must recognize the science of finance as a separate branch of economics, and grant to it its due importance in shaping the industrial as well as the political organization. And for such this work from the pen of Professor Roscher will be especially welcome.

HENRY C. ADAMS.

Nationaloekonomische Studien. Von GUSTAV COHN. Stuttgart, Ferdinand Enke, 1886. — 8vo, 796 pp.

This is a volume of collected essays on a variety of topics in theoretical and practical economics and finance. Its author, Professor Cohn, of Göttingen, is favorably known not only as one of the soundest thinkers among the adherents of the new school of economics in Germany, but as a scholar who interests himself especially in the social development going on among English-speaking peoples. The latter fact accounts in a measure for the reasonable conservatism of his views.

Among the subjects treated in this work are co-operation, the normal labor-day, the fundamental right to freedom of industry, the relation of theory to practice in politics and economics, the necessity of more training in political science for those who are to enter official life in Prussia. In a series of criticisms which close the book, various themes, such as the present condition of English political economy, Chartism, the iron wage law of Lassalle, are briefly reviewed. The chief topics of finance dealt with are the recent reforms in taxation carried out by the Swiss,

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especially in the Canton of Zürich; the financial management of railroads; the taxation of transactions in the stock exchange.

These essays are admirable examples of the best thought which the new school of economics has produced. The social standpoint is chosen and adhered to throughout the discussions. The comparative or historical method is enforced and employed, under the necessary limitations. The ethical character of political economy is always insisted upon. Hence, whenever the author touches the labor question, it is with a strong sympathy for the demands and efforts of the workingmen, tempered by a constant regard to the claims of the other classes involved. Historical development is a process so slow and difficult, that plans involving sweeping reforms must be rejected as impracticable. The author has no principles to defend either for or against state interference. He holds that the whole question is one of expediency, of technique. The shortcomings of both competition and state control are clearly recognized. The method of applying the two policies must be separately determined for each concrete case. The Constitution of the Swiss Confederation contains a clause insuring freedom of trade and industry throughout the land. Professor Cohn shows very neatly how the Cantons and the general government have applied the principle by stringent factory legislation, laws regulating the weight and quality of the bread sold by bakers, fixing the number of apothecaries who may do business in a town, and the like. The securing of freedom of traffic so easily guaranteed in democratic constitutions is shown to be a problem of the most difficult sort, not solved by letting things alone, but by an intelligent effort to satisfy conflicting interests. This work society must undertake and ever pursue, whether it will or not.

The question of restricting by statute the length of the day's labor is treated in a similar manner. It is a question of social expediency to be decided after studying the conditions favorable and unfavorable to the measure, which prevail in every group of employments, and comparing these on the one side with the sanitary, the economic, the intellectual, and the moral advantages which might come to the laborers if the hours of labor were shortened. The more thoroughly this method is used in the treatment of economic problems, the more careful scientists and statesmen will become in their advocacy of reforms. Professor Cohn is of the opinion that the day of eleven hours is about as short as the interests of society in Germany will bear.

On questions of taxation the view of the author is that the expenditures of states are increasing, and must continue so to do. This arises from the great variety of social problems which the state or local governments must undertake to solve. Hence arises the necessity of inculcating the duty of paying taxes, as contributions toward the realization

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of social ideals. Therefore the idea that the state or its government is a something apart from and foreign to the taxpayer is to be supplanted by the correct conception that the state is an all encompassing organism with the welfare of which that of the individual is involved. The author discovers from his study of Swiss finance that the tendency among democracies is strong toward indirect taxation; that the regulations about valuation and collection are made inadequate in order to spare the liberty of the individual; that when the progressive income tax is resorted to, its tendency is to make the progression rapid, and the minimum of taxable incomes high. While most of these tendencies are to be encouraged in a monarchial state, on theoretical grounds, though without much hope of practical result, they are to be discouraged in a democracy. The author prefers the direct form of taxation. He regards the stock exchange as a means of transportation, like the railroad, the telegraph, the bank. The function which it performs is similar to theirs, and its existence is to be justified on the same grounds. Therefore, although great evils appear in it, yet theoretically the business done in it should not be subjected to closer examination, or the profits obtained taxed more heavily than those of kindred employments.

H. L. Osgood.

Adam Smith, sa vie, ses travaux, ses doctrines. Par Albert Delatour. Ouvrage couronné par l'Academie des sciences morales et politiques. Paris, Guillaumin et C^ie^, 1886. — 8vo, viii, 325 pp.

It is remarkable that among the thousands of books on economic subjects, not one should have been devoted to a successful and adequate description of the position of the greatest mind in the history of the science. For the works and essays of Oncken, Skarzynski, Bagehot, Studnitz, Ricca-Salerno, Helferich, and the rest, are all insufficient, — not one of these can claim to be an exhaustive and critical estimate of Adam Smith's real position. Scarcely more successful, in fact in some respects far less successful, is the ambitious work of M. Delatour, notwithstanding the fact that it received the Léon Faucher prize of 2000 fr., and was crowned by the academy of moral and political sciences. The first portion of the work (pages 1–73), which is devoted to the biography, throws no new light on any of the vexed questions, and adds but little to what Dugald Stewart has told us; but this may perhaps be excused for the reason that no better materials for relating the story of his life exist. The remainder of the book consists in a short account of Smith's work in ethics, philology, and philosophy (pages 80–114), and in a detailed description of the *Wealth of Nations*, made up of extracts with

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running commentary. The commentaries are almost entirely laudatory, and what little criticism there is cannot be declared either new or profound. M. Delatour seems to be acquainted only with the French literature and a few English works; and he displays but few traces of familiarity with the criticisms that have been made in the last three decades upon the separable doctrines of the *Wealth of Nations*. His general standpoint may be gleaned from the following sentence: "Pour nous, la doctrine d'Adam Smith est, dans ses grandes lignes, aussi vraie qu'elle l'était il y a cent ans, parcequ'elle . . . met en jeu le ressort puissant de la responsabilité individuelle."

Such a book seems to me a work of supererogation. Long extracts from and glosses on Adam Smith are to-day antiquated. It is far better for the student to go directly to the *Wealth of Nations* itself, which is not so very much longer than this series of comments. What we need is a broad-minded estimate of Smith's work, considered not as the Alpha and Omega of the science, but as a single phase (although one of paramount importance) in a long evolution. The political economy of to-day is not that of Adam Smith, and he who starts out from an apotheosis of the great Scotchman can never arrive at satisfactory conclusions. This assumption vitiates the value of M. Delatour's book, which, be it said, is clearly written, and contains an interesting account of Smith's non-economic works.

EDWIN R. A. SELIGMAN.

Outline of Lectures upon Political Economy. By HENRY CARTER ADAMS, Ph.D. Ann Arbor, 1886.

This is the second edition of the *Outline*, which was prepared some years ago by Professor Adams for the use of his students at Cornell and Michigan Universities, where the author lectures on political economy and finance. The pamphlet contains some eighty-five pages, and the outline of the lectures is sufficiently full to enable one to get a satisfactory idea of the amount and kind of instruction offered in this subject.

If one desires to appreciate fully the immense change in the spirit and methods of economic teaching which is taking place in most of the leading American colleges and universities, it will only be necessary to compare the manner and matter of this *Outline* with the text-books on political economy which are still most widely used.

Let us glance at the formal differences first. Professor Adams continually refers to the most important and most easily accessible sources of information as to facts and opinions, not by mere mention of the books, but by citing chapters and paragraphs or pages, thus making the

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Outline a guide to the literature of the subject. He divides the *Outline* into two parts, devoting an almost equal number of pages to each part. In the first, he discusses the "Principles of Political Economy"; in the second, "Unsettled Questions in Political Economy." Under the latter title we find such topics as "Protection and Free Trade," the "Doctrine of *Laissez-faire*," "Socialism," *etc.*, — topics on which the economist of the past generation, whether holding to one set of views or the other, was so cock-sure as to regard any doubt concerning the absolute truth of his doctrine as sufficient evidence that the person entertaining it could not properly be called an economist. It would be a mistake to infer from this classification that Professor Adams himself has not pronounced views on these topics, for he is a decided free-trader and a decided opponent of socialism; but it is safe to say that students who listen to his discussion of these topics will at least get some notion of the arguments for opposing views, and will not leave his lecture-room with the question in their minds: How is it possible that men should be such fools as to entertain protectionist or socialistic doctrines? The discussions of the "Railroad Problem," of "Social and Industrial Reforms," and of the "Development of Economic Thought," are excellent; and while I should personally dissent from many of the theoretical and practical conclusions, I have nothing but thoroughgoing admiration of the spirit in which the whole discussion is conducted.

This latter remark should be extended so as to apply to the first part as well, in which, since the discussion refers chiefly to theoretical points, there is less likelihood of one-sidedness or partisanship. Professor Adams takes what seems to be the most satisfactory position in regard to the scope of political economy, *viz.*, that it should seek not merely to explain the industrial actions of men, but also to discover a scientific and rational basis for the formation and government of industrial society. In summarizing the classes of facts which may be regarded as ultimate and fundamental to economic society, he mentions among others "legal facts," thus positing at the very outset that ultimate connection between economics and law the recognition of which forms one of the most characteristic features of recent economic theory. The author thus emphasizes the circumstance that there can be no economic theory, even of production, independent of some particular legal form of society, and brings out in the correct light the relativity of economic systems and theories. The conception of property, defined in the introduction, is consistent with this general idea; and the whole standpoint is still further emphasized and illustrated in the section on the "Organization of Industries" and in the chapter on "Distribution."

Enough has been said to show that in the opinion of the reviewer Dr. Adams has succeeded in working out an *Outline of Lectures* which,

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if properly elaborated, may surely be rightly called a scientific presentation of the facts of our present industrial society.

The author's attitude toward the living issues of our social and industrial system seems to be, if I rightly interpret it, that our present society is simply one form or type of social organization which, on the one hand, is not by any means an ideal one, but, on the other, can only become ideal by a continued, though possibly slow, process of evolution, in which process the conscious interference of society itself, in the direction of improvement through its organized representatives, — the state, the church, and associations of various kinds, — is absolutely necessary in order to insure a happy result.

Such a view is in my opinion truly conservative, and the only one from which our present society has much to hope. It is equally removed from that which holds our present system to be as nearly ideal as any general system can be, and from that which regards the existing form of social organization as a hopelessly bad one, with no prospect of improvement. We have little or nothing to hope from socialism, and quite as little from the extreme form of *laissez-faire*-ism; for if the former would abolish all existing industrial institutions and put unworkable ones in their place, the latter would resist all healthy change and reform, until the forces of progress, bursting all bounds, might sweep away not only all barriers to change, but even society itself. The golden mean is fairly represented by Professor Adams, if I rightly understand his views.

EDMUND J. JAMES.

The Social Problem in its Economical, Moral, and Political Aspects. By WILLIAM GRAHAM, M.A., Professor of Political Economy and Jurisprudence, Queen's College, Belfast. London, Kegan Paul, Trench & Co., 1886. — Large 8vo, xx, 479 pp.

Poverty and the State, or Work for the Unemployed. By HERBERT V. MILLS. London, Kegan Paul, Trench & Co., 1886. — 8vo, 382 pp.

The Labor Movement, the Problem of To-day. Edited by GEORGE E. MCNEILL [and associate authors]. Boston, A. M. Bridgman & Co., 1887. — Large 8vo, xx, 615 pp.

In Professor Graham's *Social Problem* we have the first serious attempt of an English economist to treat the labor question in all its aspects. Chalmers, Senior, McCulloch, and even Fawcett, have indeed written small works on special phases of the theory, but the meeting of the Industrial Remuneration Conference in 1885 has given an impetus to

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the investigation, one result of which is apparent in the volume before us. The work is divided into four books: one on the statement of the problem and its history, another on the existing distribution of wealth and work, a third on property and inequality of wealth, and a final book on special remedies. Professor Graham starts from the assumption that the general desire of the laboring classes to raise their condition is natural and inevitable, and proposes to discuss whether their aims are also just and realizable. A survey of the history of the problem, — which we must confess is superficial and rather unsatisfactory, — together with an account of the actual condition of these classes, leads him to the conclusion that their efforts, in so far as they are not in contravention of law, are just. There remain then the means and methods, which are taken up in succession. In the economic analysis of the influence of trades-unions on the rate of wages we have perhaps the best chapters of the work. The influence of Thornton is plainly perceptible, but Professor Graham reaches some independent conclusions. He contrasts the systems of combination and non-combination in the three usual cycles of industrial activity, — expansion, depression, and the neutral state, — and concludes that Ricardo's law of natural wages is true only of the system of non-combination, and even then inapplicable to periods of expansion. In a régime of trade combinations, on the other hand, the laborer can effect a rise of wages in certain trades where there is a kind of local monopoly, in manufactures where the home producers have a considerable advantage over foreign competitors, and in home-produced luxuries of all sorts, — but in each case at the cost of the consumer. On the other hand, whenever there is a rise of profits above the customary rate, whether temporary or lasting, the laborer may hope to procure a share without increasing the cost to the consumer, and without diminishing the interests of the employer; increased wages, in such cases, often meaning decreased cost of production and increased profits.

When he leaves the field of purely economic discussion, Professor Graham's footing became less stable; and he must be declared guilty of occasional obscurity and undue generalization. He is of course an opponent of *laissez-faire*. "*Laissez-faire* while it lasted in its purity helped to heap up masters' fortunes, and had it long continued, would at last have resulted in a materialized plutocracy and a degraded proletariat." (Page 450.) But he has no faith in the drastic remedies of state socialism or land nationalization. Profit-sharing, like trades-unionism, tends, he thinks, to keep up wages among the *élite* of the artisans, and this new distribution of wealth is not an unmixed good. Co-operation presents a better outlook, but co-operation based on self-help alone seems of dubious promise. The only way out of the difficulty is the comprehensive one of a change in our conception of life, and as

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a consequence in our conception of property. There must be a moral regeneration, "and, as a result, the defining lines of law must be drawn afresh with respect to the grand topics of Property and Contract." (Page 350.) It will thus be seen that while Professor Graham escapes the dangers of the one-eyed social reformers, his own remedies are unduly vague and unsatisfactory. The scientific portions of his book are ably written; but when a scientist begins to speculate on the great generalizations of universal social reform, his results are not apt to be of much exact value. To preach an ethical awakening is the duty of the moralist, not of the economist.

The same criticism, but with far more emphasis, may be made in the case of Mr. Mills' *Poverty and the State*. The first requisite for a successful elucidation of social phenomena is a clear head; a kind heart is a very useful adjunct, but in this particular case of somewhat subordinate importance. Too many modern authors unfortunately possess a superabundance of the latter, coupled with a deficiency of the former attribute; and Mr. Mills, we are compelled to say, deserves in many respects to be put into this category. So he says, in one place: "I honestly confess I hate competition"; and again: "It is this compulsory competition which is the root cause of our poverty and pauperism"; while in another passage he tells us: "I believe with all my strength in liberty." He declares Carlyle and Ruskin to be the leaders of the new political economy. Poverty, he maintains, is due to speculations of the stock exchange, bank monopolies, usury, private ownership of land, and the introduction of machinery — for he agrees with Marx in believing that machinery never creates any new value. The one great remedy is to replace the pauper workshops by "co-operative estates," where four hours' work would be ample to provide the necessaries of a comfortable life. Mr. Mills' panacea, however, has not even the merits of novelty; a similar plan was advocated by John Bellers in the eighteenth century. Mr. Mills' book contains some redeeming features. It gives graphic pictures of the effects of parish relief, and includes a good sketch of the poor-law as well as an interesting account of the beggar colonies of the Netherlands. But the really sound opinions in the book are mere extracts from standard economists; the independent investigations of the author reveal a warm heart and burning sympathy, but very little critical acumen.

In the bulky volume on *The Labor Movement*, Mr. McNeill of the Massachusetts Bureau of Statistics of Labor has collected a number of essays written chiefly by active participants in the movement itself. The work thus possesses unusual interest as disclosing to us the actual trend of thought among the American labor leaders; but the individual contributions are, as may be surmised, of exceedingly unequal value.

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Professor E. J. James leads off with three admirably written chapters on the history of labor and recent legislation in Europe, and is followed by the editor, who attempts to give a similar survey of the general movement in the United States. Comparisons as to style and method of presentation would naturally be invidious; Professor James is a trained economist, and knows how to retain a just proportion for the various periods, while Mr. McNeill gives an unvarnished and somewhat desultory description of such facts as he has succeeded in collecting. About two-thirds of the volume is devoted to the history of the organizations among the laborers, written by representatives of the leading trades. In chapter xiv a brief survey of the progress in the miscellaneous trades is given by the editor. A striking feature of the various contributions is the generally moderate tone and the unqualified condemnation of violence. The separate historical sketches all contain some interesting facts, but differ widely in permanent value. The chapters on the printers by J. F. Farquahr, on the railroad organization by Chief Arthur, and on the building trades by E. H. Rogers, are simple, often disconnected, statements of facts, that on the printers being especially weak. The story of the textile trades by Robert Howard, as well as that of the coal miners by John McBride, and of the iron workers by John Jarrett, seem to be written on the whole from a broader point of view, although Mr. McBride goes out of his way to make a violent attack on Pinkerton's detectives in the Molly Maguire difficulties. Mr. Jarrett calls attention to the singular fact that the amalgamated association thoroughly favors conciliation, but opposes arbitration. The chapters on the shoemakers by Frank K. Foster is perhaps the best of the series, for it attempts to go beneath the facts and discover the spirit of the movement. Especially good is the account of the rise and downfall of the order of St. Crispin. Among the most disappointing portions of the work is the chapter on the history of the Knights of Labor as told by the six surviving founders. The editor apologizes for this by saying that its history is largely secret, and that the time has not yet come for exposing it to public view. This of course is much to be regretted.

The remainder of the work is occupied with a discussion of the more general phases of the movement. We have three further chapters by the editor on the "Problem of To-day," the "Hours of Labor," and the "Principles of the Knights of Labor." Mr. McNeill's ardor often leads him to picturesque utterances like the following: "The virgin soil of the South was outraged by Mammon" (the reference is to chattel slavery); the laborer out of work is "the pariah of society"; "philanthropy is the maudlin moan over the needs of the beasts, and a scoffer at the woes of humanity," *etc.*, *etc.* But on the whole his utterances are conservative and well-intentioned. Rev. Heber Newton gives a

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clear and interesting account of industrial education, while Congressman O'Neill discusses arbitration, and Congressman Morrow the Chinese question. A concise and able study on the various forms of co-operative enterprise is contributed by F. H. Giddings, the editor of *Work and Wages*. Mr. Powderly's article on the army of the unemployed is exceedingly short and disappointing; and Henry George gives evidence of the hold that he has acquired on the laborers of to-day by repeating his economic heresies in the accustomed form.

From this glimpse of the contents, some idea of the scope of the work may be formed. It disarms criticism from the outset, owing to the declaration of the editor that no claim for a scientific presentation of the subject is made. Only the laborer's side of the question is stated. But this method possesses some advantages. From the standpoint of economics, the volume furnishes us with an arsenal of facts which may be turned to good use in future; from the standpoint of practical politics, it will serve to clear up many misapprehensions and partially pave the way to a reconciliation of rival interests. Regarded in this light, it is a valuable contribution to the literature of the subject.

E. R. A. S.

Introduction to a History of the Factory System. By R. WHATLEY COOKE TAYLOR. London, Richard Bentley & Son, 1886. — Large 8vo, xviii, 441 pp.

Handel und Industrie der Stadt Basel: Zunftwesen und Wirthschaftsgeschichte bis zum Ende des XVII Jahrhunderts. Aus dem Archiven dargestellt von TRAUGOTT GEERING. Basel, Felix Schneider, 1886. — 8vo, xxvi, 678 pp.

Mr. Taylor, in his *Introduction to a History of the Factory System*, has undertaken a great task. No one question of economic history is of more importance than the transition from mediæval society to the complicated mechanism of modern industrial life. Of English authors, Toynbee alone has given us an idea of how such a history should be written, but his attempt is simply a sketch, so that Mr. Taylor's statement that "there is absolutely no independent source of information in English literature dealing with the whole of this subject" remains true. This he declares to be little less than a scandal to industrial literature. It is unfortunate, therefore, that we cannot characterize Mr. Taylor's volume as having successfully or adequately silenced this scandal. What shall we say of an author who confesses in his preface that his "reading has generally been compelled to be of a very superficial kind," and that "much of this book is a compilation from others," — inevitably so, be-

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cause "the materials are such as do not yield themselves easily to casual research"? Such confessions, indeed, are extremely frank, but at once rob the work of any pretensions to scientific value. Evidences of the "casual research" abound in almost every chapter. There is, of course, no objection to making use of the results of other writers, but Mr. Taylor draws only from books written in English, and often utterly fails to distinguish between the relative merits of his authorities, an inevitable result of not testing doctrines by independent investigation. To take only one example, his account of the English craft-guilds and mediæval municipal life is borrowed from Brentano (and his slavish imitator Howells), who has done more to confuse the subject than any other historian. Almost one-half of the *Introduction* is devoted to an account of ancient industry, three further chapters treat of mediæval conditions, and the book closes with a brief account of the great inventions in the third quarter of the last century. Mr. Taylor has certainly succeeded in collecting from current books a vast amount of interesting details with reference to the separate industries, and has presented them in a very palatable form. His book will certainly be interesting to the general reader. It modestly professes to be nothing more than a crude, hasty, and fragmentary sketch, but it might seem as if the subject deserved a more earnest treatment and a more thorough investigation. The scholar will find in it nothing new or striking.

Of a diametrically opposite character is Geering's *Handel und Industrie der Stadt Basel.* This belongs to a class of work characteristic of the German mind, minute, laborious, painstaking. For five years the author delved among the municipal archives of Basel, which is especially fortunate in possessing an almost uninterrupted series of guild regulations and proceedings from the memorable earthquake of 1356 onwards. Geering has not reached positive conclusions as to any single origin of the craft-guilds, but is content with ascribing the formation of the chief associations partly to the influence of the episcopal manors through the *officia* and the *gratia*, partly to the exigencies of the early municipal trade in the "open" or independent crafts. The guild system in Basel differed from that of many other German towns principally in its peaceful development and in the large degree of autonomy which it acquired, both facts being due to the rupture with the patricians in the thirteenth and fourteenth centuries. Geering gives a detailed account of the movement, and enters minutely into the provisions and fortunes of certain selected crafts, affording on the whole the fullest account that has yet been published. Perhaps the most important point in his description is the stress laid on the guild merchant, or the influence of mediæval trade on the prosperity of the crafts. Their varying fortunes are reproduced with an unswerving accuracy, but, as the author himself confesses, not

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a few fundamental questions are still left unanswered. The account is brought down to the beginnings of the factory system in the eighteenth century, with a promise on the part of the author to work up this latter period more fully at some future time. Geering's book cannot claim to be of importance commensurate with Schmoller's great works on the Strassburg guilds, but the student will find in it much valuable material with which to revise his opinions on mediæval industry.

E. R. A. S.

Co-operation in a Western City. By ALBERT SHAW, Ph.D., Associate Editor of the Minneapolis Daily Tribune. American Economic Association. Vol. I, No. 4. 1886. — 8vo, 106 pp.

Les Artèles et le mouvement co-opératif en Russie. Par W. LOUGUININE. Paris, au cercle Saint-Simon. 1886. — 8vo, 148 pp.

In contrast with the many works that have of late recounted with a weary iteration the oft-told story of Rochdale, Guise, and Leclaire, the present monograph of Dr. Shaw on *Co-operation in a Western City* must be accorded a hearty welcome. It is the detailed description of a remarkable experiment, of which only vague rumors had hitherto reached the outside world. We see, traced in a clear and spirited manner, the phenomenal success of less than twenty Minneapolis coopers, banding together with an investment of $15 apiece, and growing into a society of ninety members, with a capital of well-nigh $60,000. Such a brilliant showing could not but result in the initiation of similar enterprises, whose methods and results Dr. Shaw expounds with an admirable breadth of view and mastery of principle. It is gratifying to read that "the coopers themselves are emphatic in saying that the moral effects of their co-operative movement constitute its highest success." But it is evident that the founders were also keen business men. One distinguishing and unique feature of the chief society is the provision that all ordinary gains or losses are to be apportioned *pro rata* upon the wages received by each member, *i.e.*, in proportion to the work he has done; while other losses and gains, like those resulting from the work of hired help, or change in the value of real estate, or losses by fire or failure of business firms, are to be apportioned equally among the members, all of whom must be equal shareholders. This, as Dr. Shaw points out, distinguishes between the men as capitalists and as laborers, and possesses a great practical value. It might with advantage be imitated in similar enterprises. The remaining chapters are devoted to an equally lucid and interesting account of the other forms of co-operative undertakings, such as agricultural colonies, mercantile companies, and build-

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ing associations, while a special chapter treats of the huge profit-sharing scheme of the Pillsbury mills. Of course, in viewing the success of the Minneapolis attempts, the unparalleled growth of the city and all connected with it must be borne in mind; the almost fabulous appreciation in values has materially advanced the interests of the co-operators, as well as of all others. But too much stress cannot be laid upon the fact that the movement originated with the workmen themselves. As Dr. Shaw says: "It had no literary or philanthropic or *doctrinaire* beginnings. It received no coddling or advertising. Its advent was attended with no speech-making or enthusiasm." The plain, business-like, matter-of-fact character of the whole movement is the one that most thoroughly recommends it, and its success cannot but have a proselytizing effect. One of the cheering signs of the time is the prodigious impulse given to all such schemes throughout the country in the last twelve months, and the record of a success like that told in Dr. Shaw's admirable essay can only push on the good work.

That the movement, moreover, is not confined to America or the western states of Europe is shown by Louguinine's *Les Artèles et le mouvement co-opératif en Russie*. It is a matter for regret that the books of Kalatschoff and Isaieff have not yet been translated; the only source of general knowledge of the Russian *artels* or co-operative institutions having hitherto been the *résumé* of Isaieff's work by Dr. Stieda in Conrad's *Jahrbücher* some years ago. The co-operative spirit has always been a marked feature of the Russian character, as is shown by the permanence of the village community idea in the *mir* system. Some of the artels date back for centuries. Mr. Louguinine, who has himself been instrumental in introducing the co-operative banks into Russia, classes the artels into the old Russian unions dating from the fourteenth century, the mercantile societies dating from Peter the Great, and the modern productive, consumptive, banking, and insurance associations on the co-operative plan. Here again it appears that the productive associations which were inaugurated in the past few decades by governmental authority and assistance have all failed, while those dependant on private initiative and self-help have succeeded. The *zemstvo* of Tver, *e.g.*, started, in 1870, twenty-seven societies of nailmakers, shoemakers, and others, giving and lending them large sums of money, a method which was followed by the local governments in Pavlovo, Kazan, and other places. Although at one time these societies were forced into artificial prosperity, they have now all disappeared. On the other hand, the associations formed by the workmen themselves in several of the factories in Ural and elsewhere, as, *e.g.*, in Nijni-Tourino and Ekaterinbourg, seem to have prospered. Mr. Louguinine then shows that of all societies the credit-banks have been the most successful. While

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he has but faint hopes of the continued existence or vitality of the artels, he believes that a bright future is reserved for the modifications of the old idea introduced by occidental Europe. The industrial system of Russia is certainly by no means a model at present.

E. R. A. S.

The Official History of the Great Strike of 1886 *on the Southwestern Railway System.* By OSCAR KOCHTITSKY. Jefferson City, 1886. — 8vo, 117 pp.

Mr. Kochtitsky stands at the head of the Bureau of Labor Statistics and Inspection of Missouri, and has therefore had excellent facilities for obtaining the "inside" view of the Southwestern strike. He himself, in his official capacity, took a prominent part in the movement, and has now undertaken to compile a report based on authentic documents and sources for the National Bureau of Labor. The scope of the work may be gleaned from the statement in the introduction that the history "is simply a compilation of historical facts, official correspondence, and important data obtained from the most trustworthy sources. It is intended to be perfectly fair and impartial. As to the merits of the contest, the reader must form his own opinion." There is thus no occasion for criticism, nor for any comments beyond the statement that a complete survey of the movement is now first authoritatively given. This compilation, together with the testimony taken by the Congressional committee, will remain the chief source of our information as to the most important strike of modern times.

E. R. A. S.

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